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STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-vs-

BRIAN KEITH ROBERTS,

Defendant-Appellee.
_____/

Supreme Court No. 156223

Court of Appeals No. 327296

Circuit Court No. 14-0714 FC

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Defendant-Appellee's Answer in Opposition to the Prosecution's Application for Leave to Appeal

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Statement of Question Presented

I. **Did the Court of Appeals properly determine that Mr. Roberts was deprived of his state and federal rights to the effective assistance of counsel where his attorney failed to independently investigate the medical evidence underlying the prosecution's case? As a result, did trial counsel fail to consult and present independent expert witnesses who would have provided objective support for the defense, thereby prejudicing Mr. Roberts?**

Trial Court answers, "No."

Court of Appeals answers, "Yes."

Plaintiff-Appellant answers, "No."

Defendant-Appellee answers, "Yes."

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Argument Summary

The prosecution's Application for Leave to Appeal fails to identify any reversible errors in the opinion below. Nor does it identify any proper basis for this Honorable Court to grant leave to appeal. See MCR 7.305(B). The Court of Appeals' analysis in this case is not novel, nor does it conflict with any decisions of Michigan's appellate courts. Instead, the decision below involves the straightforward application of *Strickland v Washington,* 466 US 668; 104 S Ct 2052 (1984), and its progeny in an unpublished opinion, unlikely to be of any significance to the state's jurisprudence.

In the unpublished opinion below, the Court of Appeals properly applied well-established ineffective assistance of counsel jurisprudence to the facts of this case, consistent with the trial court's credibility determinations. The unanimous panel reached the right result for the right reasons. Thus, this Court should deny the prosecution's Application for Leave to Appeal.

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Counterstatement of Material Proceedings and Facts

The Court of Appeals reversed Defendant-Appellee Brian Keith Roberts' convictions for first-degree felony murder, second-degree murder, and first-degree child abuse in an unpublished per curiam opinion.[1] *People v Brian Keith Roberts*, unpublished per curiam opinion of the Court of Appeals, Docket No. 327296, attached as **Appendix A**. The Court of Appeals determined that Mr. Roberts was deprived of the effective assistance of counsel where trial counsel failed to investigate, consult, and present expert witnesses to support the accident defense he presented at trial.

In its opinion, the Court of Appeals provided the following summary of the trial record (citations to the record added for ease of reference):

> I. BACKGROUND OF THE CASE
>
> A. BASIC FACTS
>
> Defendant's son was two years old when he died. [T II 16; T IV 26, 36-37.[2]] At trial, testimony revealed that defendant began caring for his son in late September 2013, after the child's mother lost custody of him due to drug addiction. [T II 19-21, 26, 47.] In early September 2013, while the child was living with a relative of his mother, the child underwent a CT scan because he had macrocephaly, or an abnormally large head. [T II 55-56; T III 37-38, 41.] The CT scan was performed on September 11, 2013; a follow-up MRI was ordered, but the MRI was never performed. [T III 41-42; T IV 15-16.]
>
> On December 31, 2013, defendant and his girlfriend, Veronica Witherspoon, along with defendant's son and Witherspoon's five children, went to spend the night at a home that Witherspoon had recently rented. [T II 91-92, 103-104, 114-116.] Testimony at trial revealed that the older children were playing upstairs while defendant, Witherspoon, and Witherspoon's newborn baby were downstairs. [T II 123-124.] There was also testimony that one of the older children yelled that defendant's son had wet himself. [T II 124.] About 10 minutes later, defendant asked Witherspoon where his son's clothes were, and she responded. [T II 125.] Defendant then called for his son to come downstairs to be changed. [T II 125, 155; T IV 149.]

[1] Mr. Roberts was convicted of these charges on April 2, 2015, in the Kalamazoo County Circuit Court, before the Honorable Paul J. Bridenstine. Trial Transcript, Vol. VI 5-6.

[2] Citations to the trial transcripts are referred to as "T" followed by the volume and page numbers.

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Witherspoon testified that she was cleaning up in the kitchen and was facing the sink when she heard one or two thumps. [T II 135-137, 146.] Witherspoon said that when she turned around, she saw defendant holding his son up under the child's armpits and asking, "[W]hat's wrong with him?" [T II 126, 146.] According to Witherspoon, defendant looked pale and scared and the child's head was clenched back, his eyes looked "dizzy," and he was spitting up. [T II 126, 127, 155.] Witherspoon said she told defendant the child was having a seizure and instructed him to lay the child down, which he did. [T II 127.] Defendant began to perform CPR and told Witherspoon to call "911." [T II 128, 156.]

Emergency medical responders were driving nearby when the call came in and responded to the house within minutes. [T II 169-170, 202-203, 214.] When they arrived, the child was not breathing and had no pulse. [T II 192, 204, 216.] Although paramedics were able to restart the child's heart, he never regained consciousness. [T II 195-196, 206.] Officers who responded to the scene asked defendant what happened and he told them that his son fell down the stairs. [T II 175-178, 193.] The child was taken to the hospital, where a CT scan performed in the emergency room revealed bleeding in the subdural or subarachnoid spaces surrounding his brain. [T IV 24, 28.] Dr. Robert Beck, the pediatrician who took over the child's care at 8:00 a.m. on January 1, 2014, testified that the child also had "very obvious retinal hemorrhages." [T IV 24, 33.] Beck related that a CT scan from earlier in the morning showed evidence of "older fluid collections" around the child's brain, which he agreed was consistent with an older head trauma. [T IV 34.] On January 2, 2014, doctors determined that the child was brain dead and he was removed from life support. [T IV 36-37.]

Detective Kristin Cole testified that she interviewed defendant following the incident. She stated that defendant first told her his son fell down a couple stairs. [T IV 151.] However, she informed defendant that the medical reports showed that the child could not have suffered the head injuries he did from falling down a few stairs. [T IV 162.] Cole stated that defendant eventually admitted that he caused his son's fall. [T IV 164-165.] Defendant told her that his son made it down the steps. [T IV 164-165.] Defendant explained that he sat on the second or third step with his son facing him. [T IV 164-165.] He then grabbed the child's ankles and pulled them out, "intending for him to land on his butt so that [he] could change him out." Instead of landing on his butt, however, defendant explained that the child "went straight back and hit his head on the carpet." [T IV 164-165.]

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B. TRIAL

The prosecution charged defendant with first-degree felony murder, second-degree murder, and first-degree child abuse arising from his son's death. At trial, the prosecution's theory was that defendant handled the child in a violent and angry manner because the child had wet himself. [T I 245.] The prosecution also contended that the child's head injuries could only have been intentionally inflicted or inflicted with wanton and willful disregard of the life-endangering consequences of the act based on its experts' conclusions regarding the amount of force necessary to cause the injuries and the short time in which the child became symptomatic. [T V 123-124, 127.] To this end, the prosecution presented the expert testimony of Dr. Beck, Dr. Brandy Shattuck, a forensic pathologist, and Dr. Rudolph Castellani, a neuropathologist.

Dr. Beck opined that head injuries like those sustained by defendant's son would only be seen "in children who are riding bicycles hit by cars, who are in car seats and T-boned at high speeds, in car seats appropriately restrained but involved in high-speed rollovers, [and] acknowledged shaken episodes." [T IV 38.] He further testified that "retinal hemorrhages are child abuse unless you can prove through a witnessed account some mechanism of injury that could have caused it." [T IV 39.] When asked by the prosecutor whether the child's injuries could be consistent with his legs being "taken up" and the child being "thrown down," Beck stated that it "could be a scenario," but explained that it would be "the type of maneuver that I do when I do my ten pound sledge hammer cracking rock . . . for my driveway." [T IV 42.] On cross-examination, defendant's attorney, Eusebio Solis, asked Beck whether the child's injuries could have been caused if he was in a standing position and his ankles were "grabbed to put him on his butt but he goes all the way back" in a "whiplash motion and he strikes his head." [T IV 44.] Beck agreed that such a scenario could be a mechanism of injury, but stated that it boiled down to "the speed and the force at which the head hits." [T IV 45.]

Dr. Shattuck concluded that the child's injuries were "non-accidental" and characterized the force required to cause the injuries as "violent or angry or aggressive types of force" that were "the equivalent of a car accident[.]" [T IV 72, 84.] When asked by the prosecutor whether the child's injuries could have been caused by "grabbing [his] ankles, pulling him down," Shattuck stated that it depended on "how much force you [use to] pull him," noting that the force would "ha[ve] to be significant." [T IV 77-78.] Shattuck further testified that the child's September 2013 CT scan did not reveal "evidence of a bleed," so the older blood around the child's brain must have occurred after the September 2013 CT scan and before the incident in question. [T IV 75.]

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> On cross-examination, Shattuck conceded that she did not know exactly how much force would be necessary to cause the child's injuries, but emphasized again that the force would have to be "significant." [T IV 87.] Solis asked whether the child's injuries could have occurred by defendant pulling on his legs and the child falling back, to which Shattuck stated, "As long as it was a significant force, it wouldn't be a minor pull." [T IV 90.] When Solis asked why Shattuck characterized the force necessary to inflict the injuries as violent, angry, and aggressive, Shattuck explained that "when people are not in an accident, like a car accident, to get to that level of force, there's usually some type of emotion behind it." [T IV 91.] Shattuck stated that she listed the manner of death as a homicide because she believed someone else caused the child's injuries, but she agreed that she could not determine the actor's intent. [T IV 91-92.]
>
> Dr. Castellani testified that the child's injuries were indicative of "inflicted trauma." [T IV 124.] He explained that subdural hemorrhages in a young child are indicative of abuse if "there's not a motor vehicle accident or some major trauma to explain it," and additionally stated that retinal and subarachnoid hemorrhages were also highly suspicious of abuse. [T IV 123-124.] He concluded that the child's injuries were inflicted because there was "simply no other explanation that's credible[.]" [T IV 124.] On cross-examination, Castellani agreed that it would be possible to inflict such injuries by pulling a child's legs out from under him and causing the child to strike his head in a whiplash like motion. [T IV 127.] He stated, however, that this was "highly unlikely" because, although "the whole force issue is a little bit of guesswork," the "level of force required to cause a complete neurological and cardiovascular shutdown" would be "substantial." [T IV 127.]
>
> At trial, Solis conceded that the evidence showed that defendant caused his son's fall, but argued that defendant inadvertently caused his son to strike his head and that the child's death was a tragic accident. [T I 250-251.] The defense did not produce its own expert witness, although funds were approved for that purpose. Instead, Solis pointed out the inconsistencies in the prosecution's case and argued that it had not proved beyond a reasonable doubt that defendant possessed the requisite intent. [T I 246; T V 149.] He emphasized that not one medical expert testified that the child's injuries were, to a medical certainty, caused by child abuse because doctors do not determine intent. [T V 139.] Intent, he reminded the jury, is the difference between a crime and a tragic accident. [T V 139.] The jury rejected defendant's theory and found him guilty as described. [T VI 5-6.]

Appendix A 2-4.

On appeal, Mr. Roberts moved for remand on the grounds that his trial counsel was constitutionally ineffective for failing to investigate the validity of the prosecution's medical

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evidence, which resulted in trial counsel's failure to identify and present a substantial defense. Defendant-Appellant's Brief in Support of Remand, 2/11/16 12-23. Additionally, Mr. Roberts argued that he was deprived of a fair trial where the prosecutor engaged in pervasive misconduct designed to garner sympathy and depict Mr. Roberts as a dead-beat dad. Defendant-Appellant's Brief in Support of Remand, 2/11/16 24-29. He also argued that the investigating officer was permitted to make numerous improper vouching statements that invaded the province of the jury. Defendant-Appellant's Brief in Support of Remand, 2/11/16 31-37. Mr. Roberts asserted that trial counsel was constitutionally ineffective for failing to object to the pervasive misconduct and numerous inadmissible statements. Defendant-Appellant's Brief in Support of Remand, 2/11/16 29-30, 38.

The Court of Appeals remanded the case and allowed Mr. Roberts to file a Motion for New Trial on the above grounds. Order Granting Remand, 5/3/16. Mr. Roberts filed the new trial motion based on the same errors raised in his motion to remand. Motion for New Trial, 5/13/16. The court held a *Ginther* hearing[3] over two days.

In its opinion, the Court of Appeals provided the following summary of the post-conviction record (citations to the record added for ease of reference):

> At the *Ginther* hearing, Solis testified that he had never handled a case involving abusive head trauma. [GH 6/29/16 16.[4]] He admitted that he had told defendant's appellate counsel that he was not familiar with the medical controversy surrounding abusive head trauma in children, but clarified that he "did not see that controversy as a viable defense." [GH 6/29/16 16-17.] Solis explained that in 30 years of practice, he had "never seen a successful short fall defense." [GH 6/29/16 17.] Solis testified that it was "correct" that the key issue in the case was the amount of force propelling the child's fall, but he stated that he was unaware of any expert

[3]See See *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

[4] Citations to the *Ginther* hearing transcripts are referred to as "GH" followed by the date and page number(s).

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who would testify that the child's injuries could have been caused by a less forceful incident. [GH 6/29/16 17-18.]

Regarding his trial preparation and investigation, Solis explained that he researched macrocephaly and consulted with a pediatrician who specialized in child abuse, Dr. Stephen Guertin, to determine whether the child's macrocephaly might have made him more susceptible to injury, to get an "assessment of the evidence," and to obtain "a referral of any expert who would say a short fall would cause that injury." [GH 6/29/16 18-20.] Solis stated that Guertin provided him with "articles that talked about children who were injured through falls." [GH 6/29/16 21.] With regard to the child's injuries in this case, Guertin told Solis that one could not "rule out accident," but Guertin opined that the child's other injuries were consistent with abuse, which is why, Solis said, he chose not to call Guertin at trial. [GH 6/29/16 25-26.]

Solis also consulted with the prosecution's pathologist, Dr. Shattuck. [GH 6/29/16 21.] Based on his discussions with Shattuck, Solis testified that he believed he could get the prosecution's witnesses to concede that "this is not an exact science" and that "we can't determine and we can't rule out, even though they said it was remote, that it could have been caused the way [defendant] said." [GH 6/29/16 26.] Solis said he went over the articles he received from Guertin with Shattuck, and she stated that the articles were not comparable because the incidents described were not witnessed and the children did not die. [GH 6/29/16 21.] Solis agreed that, at trial, Shattuck testified that the child's injuries were not accidental, although she conceded that pulling the child's legs out from under him could generate sufficient force to cause the injuries. [GH 6/29/16 27-28.]

When asked how he formulated his defense theory, Solis stated that defendant's admissions established that he caused the child's injuries, but there was no evidence that defendant was angry or that he targeted or abused his son leading up to the incident. [GH 6/29/16 37-38.] Solis testified that the circumstances were "indicative of an accidental injury versus an intentional injury," so he cross-examined the prosecution's experts regarding the amount of force necessary to cause the injuries and whether they could have been caused by a whiplash like motion. [GH 6/29/16 26, 38.] As for the evidence that the child had an older bleed, Solis said he felt the evidence would show that the child never exhibited a change in behavior and defendant did not have a history of abusing his son, so he could argue that the old injury was accidental. [GH 6/29/16 53.]

At the *Ginther* hearing, Dr. Ljubisa Dragovic, a forensic pathologist and medical examiner, testified that he reviewed the report and documentation for the child's autopsy. [GH 6/29/16 101-104.] Dragovic opined that the autopsy should have included more sampling because the preexisting subdural hemorrhage might

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have played a role in his subsequent head trauma. [GH 6/29/16 79-80, 82, 84.] He testified that there was nothing about the presence of a subdural hemorrhage that suggests an injury was intentionally inflicted; rather, such an injury could occur with "any fall." [GH 6/29/16 102.] In Dragovic's opinion, the medical results were consistent with defendant's version of events, and it was "nonsense" to say that the force necessary to cause the child's injuries was comparable to the force involved in a car accident because there was no scientific basis for such a conclusion. [GH 6/29/16 106.] He testified that the child's preexisting head trauma may have presented a greater opportunity for reinjury with less force, and there was no basis to determine what caused the prior hemorrhage, except to say that it was caused by the child's head moving and striking an unyielding surface. [GH 6/29/16 106-107.] Dragovic similarly stated that retinal hemorrhages do not, by themselves, indicate child abuse. [GH 6/29/16 107.] He further explained that the existence of a prior subdural hemorrhage along with a new one does not indicate abuse. [GH 6/29/16 109.] Nor does the immediacy of the child's unresponsiveness indicate abuse. Dragovic concluded that there was no objective evidence in the autopsy report that would allow the conclusion that the child's death was a homicide. [GH 6/29/16 101-104.]

Dr. Julie Mack, a diagnostic radiologist, testified that she reviewed the child's CT scan performed in September 2013 and the two scans performed on January 1, 2014. [GH 8/8/16 10.] Mack explained that there is not necessarily a correlation between the extent of a subdural hemorrhage and the degree of impact or force that caused it. [GH 8/8/16 47-49.] Regarding the child's September 2013 CT scan, Mack testified that it showed prominent fluid outside of the child's brain, and the only way to determine whether the excess fluid was normal would have been to have an MRI, which the radiologist recommended, but it was never done. [GH 8/8/16 28-33.] Mack said that the September 2013 CT scan was insufficient to rule out the possibility that the child had small subdural fluid collections outside of his brain, explaining that if there was extra fluid, the bridging veins would be more susceptible to injury with less force. [GH 8/8/16 33-34.] Mack said that the CT scan taken at 12:56 a.m. on January 1, 2014, revealed evidence of a blood clot in the child's sinus that could have been old, in which case it could indicate that the child's brain was compromised before the injury at issue. [GH 8/8/16 43.] Mack said that if this was the case, a lesser injury—one that a normal child would have survived "without even turning a hair"—might topple the brain. [GH 8/8/16 43-44.]

Mack testified that the CT scan taken at 5:07 a.m. on January 1, 2014, showed that the child's brain had become so swollen that it almost completely collapsed the ventricles. [GH 8/8/16 46-47.] She explained that if a sinus blood clot had interfered with drainage, every time the heartbeat filled the blood vessels in the child's brain it could cause swelling. [GH 8/8/16 49-50.] Mack stated that, had she

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> been called to testify at trial, she would have said that the child's injuries could have been caused without significant trauma. [GH 8/8/16 45.] She conceded that there was a bleed caused by an impact; she merely disagreed that the indications of the old bleed with the new bleed were suggestive of abuse. [GH 8/8/16 89.] She further emphasized that there is no way to determine whether an injury was intentionally inflicted from a CT scan. [GH 8/8/16 46.]

Appendix A 4-6.

At the conclusion of the hearing, the parties briefed the issues. The trial court denied Mr. Roberts' motion on all grounds in a written opinion. Opinion and Order Denying New Trial, 11/4/16, attached as **Appendix B**.

Upon reviewing the record and decision below, the Court of Appeals concluded that Mr. Roberts was deprived of the effective assistance of counsel. Appendix A 1. The unanimous panel noted that trial counsel failed to investigate the "most important issue of the case – the force with which defendant would have had to act to inflict the child's injuries." Appendix A 9. Further, trial counsel's failure to present expert testimony showing that even a minor fall involving minimal force could have caused the child's injuries was deficient and was not strategic. Appendix A 9. This is because trial counsel did not have a sufficient understanding of the medical evidence and the state's controversial medical testimony "to legitimize his decision not to attempt to secure expert testimony in support of the defense theory." Appendix A 9. Trial counsel's failure to complete an independent investigation into the state's case and his failure to educate himself about the science involved in the case infected the proceedings and prejudiced Mr. Roberts. Appendix A 10. Thus, the Court of Appeals reversed the trial court's decision below and remanded for a new trial.[5]

The prosecution now seeks leave to appeal.

[5] Mr. Roberts is entitled to a new trial on the additional grounds raised in his Brief on Appeal and Motion for New Trial. Those issues are not discussed in this brief because they were not addressed by the Court of Appeals or the prosecution in its Application for Leave to Appeal. Mr. Roberts does not waive or abandon the additional issues raised on appeal.

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Argument

I. The Court of Appeals properly determined that Mr. Roberts was deprived of his state and federal rights to the effective assistance of counsel where his attorney failed to independently investigate the medical evidence underlying the prosecution's case. As a result, trial counsel failed to consult and present independent expert witnesses who would have provided objective support for the defense, thereby prejudicing Mr. Roberts.

Standard of Review

Constitutional questions are reviewed de novo and any associated findings of fact are reviewed for clear error. *Sidun v Wayne Co Treasurer*, 481 Mich 503, 508; 751 NW2d 453 (2008); *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's ruling on a motion for new trial is reviewed for an abuse of discretion. *People v Johnson*, 245 Mich App 243, 250; 631 NW2d 1 (2001).

Discussion

After lengthy proceedings on remand, the record before this Court establishes that trial counsel attempted to show that the death of Mr. Roberts' son was an accident, but failed to present available expert testimony to support that defense because he did not do sufficient research or undertake a sufficient investigation to learn such experts existed. The Court of Appeals thoroughly reviewed the record and properly reversed the trial court opinion below.

A. The prosecution's allegations rested on controversial medical evidence involving the diagnosis of abusive head trauma.

In this case the prosecution alleged that Mr. Roberts killed his son, Nehemiah, by intentionally shaking him and intentionally inflicting blunt force trauma. T IV 33-34, 38-39, 56, 70, 82, 84, 113-114, 123-124, 127. The defense theory was that Nehemiah's death resulted from an ordinary household accident, something the prosecution experts said was not possible based on their assessment of Nehemiah's injuries. GH 6/29/16 16.

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The only way the prosecution could establish the necessary elements of felony murder and first-degree child abuse was to show that Mr. Roberts knowingly and intentionally handled Nehemiah with such extreme force that Nehemiah's injury was reasonably foreseeable. See MCL 750.316(1)(b); MCL 750.136b(2). The prosecution attempted to meet its burden through its expert testimony related to "abusive head trauma." Thus, expert testimony was the cornerstone of the prosecution's case and it was devastating to the defense.

Dr. Robert Beck (a pediatrician), Dr. Brandy Shattuck (a forensic pathologist), and Dr. Rudolph Castellani (a neuropathologist), all asserted that Nehemiah's injuries could only have been caused by forces of the highest magnitude. Dr. Beck opined that the mechanism of injury could only be shaking or a high speed auto collision. T IV 38. Dr. Shattuck concluded that the injuries were "non-accidental" and characterized the force required to cause Nehemiah's injuries as "violent or angry or aggressive types of force," comparable only to "a car accident." T IV 72, 77-78, 84. Dr. Castellani posited that Nehemiah's brain injury was indicative of "inflicted trauma," and that "there's simply no other explanation...than an inflicted injury upon the child." T IV 123-124. At times, the prosecution experts asserted that subdural hemorrhages, retinal hemorrhages, and the presence of both remote (old) and acute (new) subdural hemorrhages are necessarily indicative of abuse. T IV 39, 81-82. 94, 123-124.

Nehemiah's death was and always will be a tragedy, however, that does not mean his death was the result of a homicide. This Court's recent decision in *People v Ackley* involved a similar tragic death. *People v Ackley*, 497 Mich 381; 870 NW2d 858 (2015). Like *Ackley*, this is a case where "the prosecution's theory of the case was that the defendant intentionally caused the child's unwitnessed injuries, a premise that it intended to prove with expert testimony." *Id.* at 389.

The reliability of diagnoses of abusive head trauma (AHT) and shaken baby syndrome (SBS) are highly controversial within the medical community. *Id.* at 391-392; see also, e.g. Cenziper, *Shaken*

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Science: A Disputed Diagnosis Imprisons Parents, Washington Post <http://www.washingtonpost.com/graphics/investigations/shaken-baby-syndrome/> (accessed August 28, 2017). Like in *Ackley*, in this case "there is no victim who can provide an account, no eyewitness, no corroborative physical evidence and no apparent motive to kill, the expert *is* the case." *Ackley*, 497 Mich at 397 (emphasis in original), citing Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 Wash U L Rev 1, 27.

This Court's decision in *Ackley* did not create a new rule or change the already existing standards for ineffective assistance of counsel claims. Rather, this Court relied upon the well-established obligations of trial counsel to undertake an independent investigation into the state's case. E.g. *Ackley*, 497 Mich at 391-392, citing *Hinton v Alabama*, __ US __; 134 S Ct 1081 (2014) and *People v Trakhtenberg*, 493 Mich 38; 826 NW2d 136 (2012). In addition, this Court recognized that the reliability of diagnoses of abusive head trauma are highly controversial within the medical community. *Id.* at 391-392.

B. Trial counsel lacked the necessary experience and familiarity with the controversial medical science underlying the prosecution's case.

Because the prosecution's case rested on controversial medical testimony, it was imperative that trial counsel independently investigate the prosecution's evidence and "educate himself" about the science involved. *Ackley*, 497 Mich at 391. Trial counsel may be ineffective for failing to consult an expert "when counsel had neither the education nor the experience necessary to evaluate the evidence and make for himself a reasonable, informed determination as to whether an expert should be consulted or called to the stand...." *Trakhtenberg,* 493 Mich at 54 FN 9 (quotation marks and citations omitted).

In this case, trial counsel lacked the experience and the education to be able to make a reasonable, informed decision about whether he should proceed to trial without objective expert

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support for the defense. Although trial counsel worked for years as both a prosecutor and defense attorney, Mr. Roberts' case was the first time he came across the controversial diagnosis of abusive head trauma. GH 6/29/16 16. He failed to take the necessary steps to educate himself about the controversy, as evidenced by his testimony at the evidentiary hearing:

- At one point, trial counsel said that he was not familiar with the abusive head trauma controversy at the time of Mr. Robert's trial. GH 6/29/16 16-17. He later claimed that when he said that, what he meant was that he had not seen a successful defense involving a theory about a short fall. GH 6/29/16 16-17.

- When preparing for Mr. Roberts' trial, trial counsel did online research regarding the medical evidence, but it was primarily focused on macrocephaly, rather than abusive head trauma. GH 6/29/16 29. Trial counsel testified that his online research about macrocephaly led him to abusive head trauma, but he suggested he found nothing useful online about abusive head trauma. GH 6/29/16 29. This conclusion stands in contrast with the many, readily available and free online articles about both sides of the controversy.

- Trial counsel's self-described understanding of the controversy (about whether an accidental short fall can cause fatal injuries like those suffered by Nehemiah) stands in contrast with this Court's recognition that the controversy centers around the *reliability* of abusive head trauma diagnoses more generally. Compare GH 6/29/16 17 with *Ackley*, 497 Mich at 391-392.

- Finally, and perhaps most importantly, because he did not understand the nature of the controversy and the science involved, trial counsel was not aware that there were any experts who would reach conclusions contrary to those presented by the prosecution's experts at trial. GH 6/29/16 18.

C. Trial counsel failed to take the basic investigative steps any reasonably competent attorney would have taken in a case like this, including obtaining an independent review of the autopsy and radiology by qualified experts.

When trial counsel first reviewed the case and learned Nehemiah had an abnormally large head, he thought that may have played a role in Nehemiah's injuries. GH 6/29/16 20. Trial counsel decided to consult with a pediatrician, Dr. Stephen Guertin. GH 6/29/16 19-20. He settled upon Dr. Guertin because he had worked with him before on around five cases as both a prosecutor and a defense attorney. GH 6/29/16 21-22.

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However, as far as trial counsel knew, Dr. Guertin did not have any expertise in reviewing autopsies or brain injuries, the very thing trial counsel asked him to do. GH 6/29/16 23. Dr. Guertin did not go over the autopsy photos of the brain injury with trial counsel, nor did he ever review the slides of samples taken from the autopsy. GH 6/29/16 23, 25. Instead, Dr. Guertin told trial counsel that it was possible the head injury resulted in the manner described by Mr. Roberts, but that other marks on Nehemiah's body were, in his opinion, consistent with physical abuse. GH 6/29/16 23-25. As a result, trial counsel decided not to call Dr. Guertin as a witness at trial. GH 6/29/16 21-22.

At some point, Dr. Guertin gave trial counsel some articles about case studies involving children who suffered injuries from short falls. GH 6/29/16 21. Trial counsel then took those articles to Dr. Shattuck, the state's expert, who told him the studies did not support his accident theory. GH 6/29/16 21. After that, trial counsel did not take any further steps to investigate the prosecution's medical evidence. GH 6/29/16 20, 26, 28.

Instead of consulting an independent medical examiner, trial counsel chose to consult a pediatrician who was not qualified to provide the very opinion he was retained to provide. GH 6/29/16 19, 23. Trial counsel did not bother to learn whether the expert he consulted even had experience performing autopsies before asking him to review the autopsy in this case. GH 6/29/16 23. As a result, his decision to consult Dr. Guertin rather than a qualified expert in the proper field or fields was objectively unreasonable. *Trakhtenberg*, 493 Mich at 53-54 (describing trial counsel's constitutionally deficient pretrial investigation, which included consulting the wrong kind of expert for the factual issues involved that case).

Even though it was clear from the outset that this was a homicide case in which the findings of the state's medical examiner would be critical, it simply did not occur to trial counsel to consult with or have the autopsy report reviewed by another medical examiner. GH 6/29/16 26. Trial

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counsel's failure to seek a second opinion on the autopsy was objectively unreasonable in a case like this where the conclusions of the medical examiner involve highly controversial medical evidence. *Trakhtenberg*, 493 Mich at 53-54 (trial counsel failed to undertake a complete investigation where she failed to consult with key witnesses who would have revealed weaknesses of the prosecution's case).

Trial counsel assumed Dr. Shattuck was unbiased and that her views were universal within the medical community. GH 6/29/16 43. He lacked any experience with cases involving abusive head trauma and so was unaware of the controversy around the reliability of such diagnoses. GH 6/29/16 16-17. As a result, when Dr. Shattuck told him that his theory did not hold water, he stopped pursuing it and decided to pursue an alternative plan to simply get a few concessions from the state's experts at trial. GH 6/29/16 27. But, he lacked the necessary understanding of the controversy and failed to use the numerous scientific publications on the topic to confront or impeach the prosecution's experts. See *Ackley*, 497 Mich at 391, citing *Lindstadt v Keane*, 239 F3d 191, 202 (CA 2 2001) (noting that counsel's lack of familiarity with pertinent studies "hamstrung" his effort to effectively cross-examine the prosecution's expert witness). He never considered consulting an independent forensic pathologist or any other specialized experts related to pediatric head trauma, such as a neuropathologist, a neurologist, a biomechanical engineer, or a radiologist. GH 6/29/16 20, 26, 28.

For these reasons, trial counsel's decision to consult Dr. Shattuck, rather than an independent medical examiner, was also objectively unreasonable. Dr. Shattuck concluded Nehemiah's injuries were necessarily non-accidental and intentionally inflicted with significant force. T IV 84, 72, 77-78. Further, Dr. Shattuck made it clear to trial counsel that she credited the prosecution's abusive head trauma theory and disagreed with the trial counsel's theory that it was possible the child's injuries occurred accidentally in the manner described by Mr. Roberts. GH 6/29/16 21.

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Trial counsel's conversation with Dr. Shattuck should have put any reasonably competent attorney with the requisite familiarity with the abusive head trauma controversy on notice that Dr. Shattuck was on the "other side" of the debate. See *Ackley,* 497 Mich 390-391 (trial counsel lacked the requisite familiarity with abusive head trauma to justify his decision to consult only an opponent of the very defense theory counsel was to employ). The controversy itself turns on whether abusive head trauma can be reliably diagnosed, especially in situations where other potential causes of the injuries at issue cannot be or were not conclusively ruled out. Those other causes might include a short fall scenario, but can also include chronic medical conditions that cause children to be more susceptible to hemorrhages such that a minor impact can cause a fatal injury. Dr. Shattuck's conclusion that Nehemiah's death was a homicide and resulted from abusive head trauma in a case where the only significant injury was to the back of Nehemiah's head necessarily puts her on one side of the debate.

Any reasonably competent attorney representing Mr. Roberts in this case would have consulted a qualified and independent neuropathologist from the other side of the debate and trial counsel's failure to do so was objectively unreasonable. *Trakhtenberg*, 493 Mich at 52-53, citing *Strickland*, 466 US 668; 104 S Ct 2052 (1985).

D. The Court of Appeals properly reversed the trial court's decision, which failed to consider the specific instances of deficient performance alleged by Mr. Roberts and insulated trial counsel's performance from meaningful review by characterizing his failures as strategic decisions when they were not.

The trial court reversibly erred as a matter of law by concluding that trial counsel's failure to consult and present the critical expert testimony was a reasonable trial strategy, even though counsel was admittedly unaware that such experts existed. Compare Appendix A 9 and Appendix B 12.

The trial court unfairly characterized Mr. Roberts' arguments about counsel's deficient performance as asserting "that not calling an expert to counter a government expert in an abusive

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head trauma case is *per se* ineffective assistance of counsel," and then simply dismissed that position as unsupported by existing case law. Appendix B 12. In contrast, Mr. Roberts asserted several specific instances of deficient performance that began with counsel's inadequate investigation and culminated with his failure to present favorable expert testimony and to effectively cross-examine or impeach the state's experts at trial. Defendant-Appellant's Supplemental Brief in Support of Motion for New Trial, 9/21/16 11-14. Unlike the trial court, the Court of Appeals considered each instance of deficient performance alleged under *Strickland*, including trial counsel's failure to adequately investigate the controversy, consult appropriate experts, prepare to cross-examine the state's experts, and to present expert testimony to support the defense, as it was required to do. See Appendix A 10.

The Court of Appeals properly found that trial counsel failed to investigate the "most important issue of the case – the force with which defendant would have had to act to inflict the child's injuries." Appendix A 9. Trial counsel could not have made a reasonable strategic decision to forgo presenting expert testimony to support the defense theory and refute the prosecution's experts' assertions. Appendix A 9. This is because trial counsel did not have a sufficient understanding of the medical evidence and the state's controversial medical testimony "to legitimize his decision not to attempt to secure expert testimony in support of the defense theory." Appendix A 9.

Even trial counsel admitted that if he had been aware of available expert testimony that would have supported the defense theory of accident, he would have pursued it. When asked whether the state's medical examiner told him there were experts who would opine that Nehemiah's injuries could have resulted from an accident, trial counsel responded, "**Had she told me that I would have asked them for their name and address**?" GH 6/29/16 60. Thus, trial counsel's own testimony established that his failures were the result of oversight and his complete lack of awareness of the AHT controversy, rather than any sort of reasonable strategy.

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Further, trial counsel lacked the requisite familiarity with the abusive head trauma controversy and so did not have sufficient information to "legitimize his decision," even if it was intentional. Appendix A 9; *Strickland*, 466 US at 690-691 ("[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."). For these reasons, the trial court reversibly erred as a matter of law by concluding that trial counsel's failures were strategic decisions.

The trial court further erred as a matter of law by concluding that trial counsel's investigation was adequate. For example, the trial court detailed trial counsel's conversation with Dr. Shattuck and concluded that she was an "objective witness" and it was reasonable for trial counsel to rely on her advice when forming his trial strategy. Appendix B 10. Regardless of whether the trial court found Dr. Shattuck's testimony to be credible, she was not an independent expert. See MCL 52.212 (detailing the medical examiner's statutory obligation to the prosecution). An expert's independence from the state is critical to the meaningful adversarial testing that drives our criminal justice system. See *Hinton*, 134 S Ct at 1090 (noting that the threat of wrongful convictions "is minimized when the defense retains a competent expert to counter the testimony of the prosecution's expert witnesses.") (quotation marks and citations omitted). This is especially so where the reliability of the opinions rendered is controversial. Instead, trial counsel limited his investigation based on the representations of the state's key expert witness. Doing so was objectively unreasonable and akin to limiting an investigation based on a police officer's assertion that the defendant is guilty.

Finally, the trial court suggested trial counsel made a reasonable strategic decision to forgo consulting experts who would testify that Nehemiah's injuries could have resulted just as Mr. Roberts said, in order to pursue a strategy of obtaining concessions from the state's experts. Appendix B 2. This was not a reasonable strategy under the circumstances, nor did trial counsel take the necessary steps to implement such a strategy. Had trial counsel been familiar with the

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controversy involving abusive head trauma, he would have known it was unreasonable to expect the state's experts to concede anything comparable to what an expert like Dr. Dragovic or Dr. Mack, on the other side of the controversy, could provide. And it would be all the more unreasonable to pursue such a strategy without consulting experts who could educate counsel about the other side of the controversy and help him prepare to cross-examine the state's experts.

It is no wonder that trial counsel was not successful in pursuing this unreasonable strategy. While the trial court asserted that trial counsel got concessions from the prosecution experts at trial, it failed to identify a single concession in the trial record. That is because none of the state's experts truly conceded that Nehemiah's injuries could have resulted accidentally in the manner described by Mr. Roberts. As observed by the Court of Appeals, the state's experts each asserted and maintained on cross-examination that Nehemiah's injuries were necessarily intentionally inflicted with force comparable to an auto collision.[6] Appendix A 8 FN 2, 10; see also T IV 33-34, 38-39, 56, 70, 82, 84, 113-114, 123-124, 127. The prosecution's suggestion to the contrary, that its experts conceded that Nehemiah could have died in the manner described by Mr. Roberts, is not supported by the record and is contrary to its position at trial.[7]

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[6] The prosecution's experts also characterized the force required to cause Nehemiah's injuries as "violent or angry or aggressive," T IV 72, and said the injuries were only seen in cases where children are hit by cars while riding bicycles, T IV 38. One of the prosecution's experts made an analogy to the force he generates when breaking up his cement driveway with a 10-pound sledgehammer. T IV 42.

[7] The following are excerpts from the prosecution's closing argument:

> "Retinal hemorrhages are child abuse unless proven otherwise… [Dr. Beck] described the act to be very forceful injury and it is not explained by a fall of two to three stairs… [Dr. Beck] define (*sic*.) this child's injuries as no-accident abusive trauma." T IV 128-129.
>
> "Dr. Shattuck testif[ied] that… significant amount of force had to have been applied to the head, violent, angry force, not just a fall or bump… It's consistent with a high-speed forceful impact, rapid acceleration-deceleration." T IV 129.
>
> Regarding Dr. Castellani's testimony the prosecutor argued "… some of the findings made at the autopsy in and of themselves stand alone for child abuse." T IV 131.

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Finally, the trial court reversibly erred by suggesting that trial counsel's failure to consult the necessary experts to support his defense is excusable because the appropriate experts never fell into his lap. Specifically, the trial court noted that "Mr. Solis was never provided the actual name of an expert who could have meaningfully assisted him." Appendix A 10. This is another instance of the trial court ignoring counsel's most essential function: to undertake an independent investigation into the state's evidence and to consult witnesses who might reveal weaknesses in the prosecution's case. *Trakhtenberg*, 493 Mich at 52-54, citing *Strickland*, 466 US at 690-691.

E. Trial counsel's constitutionally deficient performance permeated every aspect of the trial.

Before the trial even began, any reasonably competent attorney who undertook a basic investigation into the validity of the prosecution's evidence and who consulted with the necessary experts would have made the necessary objections or filed motions in limine to limit the prosecution's experts' opinions to their proper fields of expertise. See MRE 702.

For example, even though questions about the degree of force necessary to cause certain types of injuries require a background in physics and/or biomechanics, the prosecution's forensic pathologist, neuropathologist, and pediatrician were all permitted to provide opinions about the force necessary to cause Nehemiah's injury. T IV 38, 56, 61, 70, 72, 77-78, 123-124. Because they lacked the necessary expertise in biomechanics, it is not at all clear what these opinions, including that the force necessary to cause Nehemiah's injury was comparable to an auto or train collision, were based upon. See MRE 702. Not only were these opinions inadmissible because they were outside the prosecution experts' areas of expertise, but they were also subject to challenge under *Daubert* and MRE 702 because they were not the result of the application of reliable principles in the experts' areas of specialization to the facts of the case. See MRE 702; *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786 (1993).

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Next, any reasonably competent attorney would have reviewed scientific or scholarly publications about the medical controversy surrounding abusive head trauma. *Ackley,* 497 Mich at 391. While trial counsel claimed he did some online searching that led to information about abusive head trauma and did not find anything helpful, there are numerous, readily available articles in both scientific and news publications addressing the controversial nature of the diagnosis. See, e.g. Haberman, *Shaken Baby Syndrome: A Diagnosis that Divides the Medical World*, New York Times <http://www.nytimes.com/2015/09/14/us/shaken-baby-syndrome-a-diagnosis-that-divides-the-medical-world.html?_r=0> (accessed August 28, 2017).

In addition, scholarly publications about the unreliability of abusive head trauma diagnoses have existed for years, including a 2012 article recently cited by this Court in *Ackley*. *Ackley*, 497 Mich at 391. Even Dr. Guthkelch, who first theorized SBS in 1971, has since expressed concern that SBS/AHT cannot be accurately diagnosed and wrote, **"It is wrong...to fail to advise...courts when these are simply hypotheses, not proven medical or scientific facts..."** Guthkelch, *Problems of Infant Retino-Dural Hemorrhage with Minimal External Injury,* available free online at: <https://www.law.uh.edu/hjhlp/volumes/Vol_12_2/Guthkelch.pdf> (accessed August 28, 2017).

Had he been more familiar with the readily available publications about the abusive head trauma controversy, trial counsel would have known he needed to consult with specialized experts in different fields. For example, when preparing to cross-examine Dr. Castellani, any reasonably competent attorney would have reviewed his report and the evidence upon which the report was based with a neuropathologist on the "other side" of the abusive head trauma debate. Doing so would have armed counsel with material for cross-examination and impeachment.

For that very same reason, the prosecutor consulted with Dr. Castellani to prepare its lengthy cross-examination of Dr. Dragovic at the *Ginther* hearing. GH 6/29/16, 114. The state arranged for Dr. Castellani to observe Dr. Dragovic's testimony and then consulted with him for

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several minutes before beginning its cross-examination of Dr. Dragovic. GH 6/29/16, 114. As a result, the state subjected Dr. Dragovic to a thorough cross-examination using journal articles, scientific publications, and emphasizing the fact that he was on the "other side" of the abusive head trauma debate. These are the very steps any reasonably competent attorney would take when preparing to cross-examine an expert in a case like this and trial counsel's failure to take those steps was objectively unreasonable.

Trial counsel's basic failure to educate himself about the state's controversial medical evidence and his subsequent failure to consult the appropriate experts for the case meant that he never learned information from those experts which would have revealed weaknesses in the prosecution's case. See *Trakhtenberg*, 493 Mich at 53-54. For example, because he did not consult an independent radiologist, trial counsel never learned it was possible Nehemiah suffered from a chronic subdural hemorrhage before Mr. Roberts ever took custody of him and that a chronic preexisting hemorrhage could make a child susceptible to a fatal injury from even a minor impact. GH 6/29 107, 135; GH 8/8/16 34. At trial, Dr. Shattuck testified that Nehemiah was a normal, healthy child, even though she did not take the necessary steps to rule out other preexisting medical conditions which could have caused a chronic subdural. GH 6/29/16 81-82, 84, 87. As a result, even though one cannot rule out the possibility of a chronic subdural from a CT, the prosecution witnesses suggested that one could. Trial counsel failed to cross-examine or contradict the prosecution's experts on that point.

In another example, because trial counsel did not consult an independent forensic pathologist, he never requested or obtained the autopsy slides, which contained samples of tissues from the autopsy. GH 6/29/16 76-77. He never learned the autopsy was not done in accordance with best practices and that Dr. Shattuck took only a single sample of the dura where she should have taken several samples from each of the hemorrhages in order to compare the relative healing of

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each hemorrhage to determine when they occurred. GH 6/29/16 79-80, 82, 84. Trial counsel did not realize that no samples were taken of the sagittal venous sinus, nor did he realize the significance of that oversight. GH 8/8/16 43-44. These points about the autopsy presented additional opportunities for trial counsel to impeach or contradict the prosecution's experts that he did not even realize existed because of his own lack of familiarity with abusive head trauma diagnoses.

Perhaps most significantly, had trial counsel consulted an independent forensic pathologist like Dr. Dragovic, he would have been able to present testimony like Dr. Dragovic gave at the *Ginther* hearing. Dr. Dragovic explained that based upon the autopsy photos he could conclusively rule out violent shaking or slamming as a mechanism of Nehemiah's injury because of the lack of other injuries consistent with such violent contact. GH 6/29/16 105. The jury never heard any such testimony because trial counsel remained unaware experts who were qualified and able to provide such opinions even existed. GH 6/29/16 18.

The above examples are just a small sample of the myriad ways in which trial counsel's lack of familiarity with abusive head trauma and investigative failures manifested throughout the trial. Further, trial counsel failed to present available expert testimony that would have provided objective support for the defense theory presented at trial, even though the prosecution's case rested primarily on its own expert testimony. *Ackley*, 497 Mich at 392; see also *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (failure to call a witness constitutes ineffective assistance when it deprives a defendant of a substantial defense). Mr. Roberts met his burden of establishing prejudice under *Strickland* through the testimony of Drs. Dragovic and Mack as examples of the sort of available, specialized expert testimony any reasonably competent attorney would present (or at least consult) in a case like this.

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F. The Court of Appeals properly reversed the trial court's decision, which failed to evaluate prejudice under the reasonable probability standard and gave short shrift to the significance of conflicting expert opinion testimony in a close case.

The Court of Appeals properly concluded that trial counsel's failure to consult and present expert witnesses to support the accident defense presented at trial prejudiced Mr. Roberts. The trial court's analysis of prejudice is reversible error because it effectively held Mr. Roberts to an artificially inflated burden on appeal.

The trial court erred as a matter of law by characterizing the expert testimony offered at the *Ginther* hearing as cumulative of "what [the jury] already heard." Appendix B 15. First, the trial court understated the significance of expert testimony supporting a defense theory, which is well-established in our state and federal jurisprudence. E.g. *Hinton,* 134 S Ct at 1090. In addition, the testimony of Drs. Dragovic and Mack at the *Ginther* hearing was not cumulative of any evidence presented by the defense at trial. For example, Dr. Dragovic unequivocally opined that Nehemiah's injuries could have been the result of an accident just as Mr. Roberts explained. He characterized Dr. Shattuck's opinion that the injuries prove that Mr. Roberts handled Nehemiah with a massive force, similar to that of car or train wreck, as "nonsense." GH 6/29/16 106. Nehemiah's injuries could have been caused by "a fall from any distance." GH 6/29/16 153. Thus, the expert testimony offered at the *Ginther* hearing was not cumulative of the evidence presented at trial in kind or in substance.

This is a case where the prosecution presented testimony from five experts, three of whom opined that the force necessary to cause Nehemiah's injuries was comparable to an auto collision. In closing argument, the prosecutor went so far as to urge the jury to convict based on the combined experience of its unchallenged experts:

> You now, ladies and gentlemen, are the eyes, the ears and the heart of Nehemiah Dodd. He hopes that you saw clearly, you listened

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> attentively, and using all of the tools presented, **including the over 88 years of experience by the five different doctors presented.**
>
> I am respectfully asking that you return a verdict of felony murder and child abuse in the first degree and I thank you.

T V 136 (emphasis added). As this Court observed in *Ackley*:

> **The prosecution's voluminous expert testimony made the need for an effective response by defense counsel particularly apparent and strong, and it rendered counsel's failure to offer expert testimony particularly glaring and harmful to the defendant.** Because of counsel's omissions and the resulting absence of suitable expert assistance, the prosecution's expert testimony appeared uncontested and overwhelming. Contrary to the Court of Appeals, **we believe this consequence militates in favor of, rather than against, the defendant's claim of relief.**

Ackley, 497 Mich at 396-397 (emphasis added). The trial court's failure to consider the impact of counsel's "glaring" omissions was reversible legal error.

The trial court further erred as a matter of law by concluding that Mr. Roberts could not establish prejudice because the experts presented at the *Ginther* hearing testified about "possibilities" that did not sufficiently establish Mr. Roberts' innocence. See Appendix B 15; Prosecution's Application for Leave to Appeal, 8/1/17 29. First, the testimony from the *Ginther* hearing established that there are eminently qualified experts who would testify that Mr. Roberts' account of the incident was consistent with Nehemiah's injuries. GH 6/29/16 103; GH 8/8/16 45. This was the very sort of "objective, expert testimonial support" the defense needed to effectively present its accident theory at trial. See *Ackley*, 497 Mich at 392.

Further, by dismissing the expert testimony because the opinions offered were appropriately qualified by the experts as something less than a certainty, the trial court effectively held Mr. Roberts to an artificially inflated burden on appeal. Mr. Roberts need only establish a reasonable probability that trial counsel's failures affected the outcome of the trial, not that he is innocent beyond a reasonable doubt. See *Strickland*, 466 US at 694. A reasonable likelihood is merely a likelihood

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sufficient to undermine our confidence in the verdict, and is less than a preponderance of the evidence. *Id.* Because the prosecution's case rested primarily on its unchallenged expert testimony, there is a reasonable probability of a different outcome had defense counsel understood and rebutted this expert testimony with his own. *Ackley*, 497 Mich at 394, citing *Strickland*, 466 US at 694. Presenting available evidence to contradict even one of the prosecution experts' controversial assertions about the potential causes of the remote subdural hemorrhage, the force necessary to cause Nehemiah's injury, or about Nehemiah's health at the time of his injury would have been reasonably likely to result in a different outcome. *Strickland*, 466 US at 693; *People v Pickens*, 446 Mich 298, 312-314; 521 NW2d 797 (1994). Trial counsel's failure to do so left the jury with the unmistakable impression that the prosecution's expert testimony was not in dispute.

Finally, the trial court also erroneously asserted that Mr. Roberts could not establish prejudice here because of the circumstantial evidence offered by the prosecution, such as variations in Mr. Roberts's statement to law enforcement, or the uncorroborated assertion by a rebuttal witness not subject to sequestration that Mr. Roberts hit his son on an earlier occasion. Similar evidence was presented at the *Ackley* trial and was emphasized by the state on appeal. Nonetheless, this Court recognized that where the cornerstone of the prosecution's case is expert testimony about abusive head trauma, counsel's failure to present expert testimony to support the defense theory of accident was reasonably likely to have affected the outcome. This Court observed:

> We do not disagree that the defendant's behavior was relevant and, furthermore, that a jury might consider it evidence of guilt. The probability that the jury would do so, however, might be said to **make it even more critical that counsel counter the expert-endorsed theory of his client's guilt with an expert-endorsed theory of his client's innocence**. Had counsel provided a different lens through which to view his client's behavior, those same "peculiar" actions by the defendant might have instead been perceived as the missteps of a panicked, but nonetheless innocent, caretaker.

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Ackley, 497 Mich at 395 FN 8 (emphasis added). In contrast, the trial court's analysis here held Mr. Roberts to the substantially higher standard of definitively proving his innocence on appeal, contrary to state and federal law.

Our justice system relies on the adversarial process to ensure that all relevant facts are presented, within the framework of the rules of evidence, so that the trier of fact can ascertain the truth. Expert testimony serves as both a source of factual information and as an aid in understanding factual evidence introduced by others. Expert witnesses are the necessary conduit for providing this vital information to the trier of fact in cases involving scientific evidence. Further, in cases resting on abusive head trauma diagnoses, familiarity with the underlying medical controversy and the numerous scholarly works addressing it are imperative to effectively challenge the state's case. *Ackley*, 497 Mich at 390-392.

As observed by the Court of Appeals, Mr. Roberts' trial involved the presentation of medical opinions that Nehemiah died as the result of abuse as if those opinions were indisputable scientific fact. Instead, those opinions are highly controversial and hotly contested by equally qualified medical experts. *Ackley*, 497 Mich at 391-392. Where the jury only ever heard the one side of the debate that supported the prosecution's case and never heard the other side of the debate, which supported the defense, there is more than a reasonable probability that counsel's failures affected the jury's verdict. *Id.*

For all of these reasons, trial counsel's constitutionally deficient performance at trial deprived Mr. Roberts of the effective assistance of counsel and the fair trial to which he was entitled. US Const, Ams VI, XIV; *Strickland*, 466 US at 686; Const 1963, art 1, § 20; *Pickens*, 446 Mich at 310-311.

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G. The Court of Appeals properly applied this Court's jurisprudence to conclude that Mr. Roberts was deprived of the effective assistance of counsel.

In its application, the prosecution asserts that the Court of Appeals did not properly defer to the trial court. Prosecution's Application for Leave to Appeal, 8/1/17 29. While it would be reversible error for the Court of Appeals to disregard the trial court's credibility determinations in reaching its conclusions, the Court of Appeals' analysis and conclusions are consistent with the trial court's credibility determinations. Although the trial court concluded that the defense experts' opinions failed to establish a certainty that death was an accident, it did not find their testimony lacked credibility. Along those same lines, both the trial court and Court of Appeals impliedly found trial counsel's testimony to be credible. The Court of Appeals reversed the trial court because of its erroneous application of law. Appendix A 1, 9, 10.

In addition, this Court should reject the prosecution's invitation to disregard the expert testimony about abusive head trauma presented at the *Ginther* hearing because it was "biased." Prosecution's Application for Leave to Appeal, 8/1/17 36. The prosecution is essentially asking this Court to ignore what it recognized in *Ackley*: diagnoses of abusive head trauma are highly controversial within the medical community.[8] The Court relied upon a number of materials in reaching this conclusion, including a text on the risk of wrongful convictions based on unreliable abusive head trauma diagnoses. In addition, one of the experts who testified in *Ackley* described this controversy and the resulting divide in the medical community as being like warring religions. See *Ackley*, 497 Mich at 861 ("this divide is 'like a religion' because each expert has deeply held beliefs about when each diagnosis is supported, and the defendant should have the benefit of an expert who '[i]n his or her religion, believes this could be a short-fall death.'"). The expert testimony from

[8] The trial court similarly expressed skepticism about the existence of the controversy in its opinion. Appendix B 7 (noting that "A controversy apparently exists...).

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the *Ginther* hearing was not biased, but rather represented the other side of a hotly contested issue within the medical community and was presented by imminently qualified experts.

In its application, the prosecution also argues that this case is different from *Ackley* such that this Court should disregard it in its analysis of this case. Prosecution's Application for Leave to Appeal, 8/1/17 20. In so doing, the prosecution ignores Ackley's central holding: where the prosecution's case rests upon controversial and highly specialized science, trial counsel's duty to undertake an independent pretrial investigation includes a duty to educate himself about the science involved and consult with appropriate experts to reveal weaknesses in the prosecution's case. *Ackley*, 497 Mich at 393-394. This holding was based squarely upon the well-established jurisprudence of the United States Supreme Court, see *Strickland*, 688 US 668, and must control this Court's analysis.

Conclusion

The prosecution's Application for Leave to Appeal fails to identify any reversible errors in the opinion below. Nor does it identify any proper basis for this Honorable Court to grant leave to appeal. See MCR 7.305(B). The Court of Appeals' analysis in this case is not novel, nor does it conflict with any decisions of Michigan's appellate courts. Instead, the decision below involves the straightforward application of *Strickland* and its progeny in an unpublished opinion, unlikely to be of any significance to the state's jurisprudence. Further, the Court of Appeals reached the right result (a new trial for Mr. Roberts) for the right reasons (because trial counsel failed to undertake the independent investigation necessary for meaningful adversarial testing of the state's controversial evidence). Thus, this Court should deny the prosecution's application for leave to appeal.

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Summary and Request for Relief

WHEREFORE, for the foregoing reasons, Defendant-Appellee Brian Keith Roberts asks that this Honorable Court deny the prosecution's Application for Leave to Appeal.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

/s/ Erin Van Campen

BY:_____

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Dated: August 29, 2017

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Appendix A

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 6, 2017
v	No. 327296 Kalamazoo Circuit Court
BRIAN KEITH ROBERTS, Defendant-Appellant.	LC No. 2014-000714-FC

Before: STEPHENS, P.J., and SHAPIRO and GADOLA, JJ.

PER CURIAM.

This case arises from the death of defendant's young son on January 2, 2014, after the child suffered a severe head injury on New Year's Eve, December 31, 2013. Defendant was convicted by a jury of first-degree felony murder, MCL 750.316(1)(b), and first-degree child abuse, MCL 750.136b(2), in connection with his son's death.[1] The trial court sentenced him as a third-offense habitual offender, MCL 769.11, to life imprisonment without the possibility of parole for his felony-murder conviction and 30 to 50 years' imprisonment for his first-degree child abuse conviction. On appeal, defendant argues, among other issues, that he was denied the effective assistance of counsel because his trial counsel failed to properly investigate the medical controversy surrounding abusive head trauma in young children and failed to secure expert testimony in support of the defense theory that his son's head injury was the result of a tragic accident rather than intentional abuse. Because we agree that counsel's performance under the circumstances fell below an objective standard of reasonableness and prejudiced defendant, we vacate defendant's convictions and remand for a new trial.

[1] Defendant was also convicted of second-degree murder, MCL 750.317, in connection with the death of his son. Below, defendant asked the trial court to vacate his second-degree murder conviction on double jeopardy grounds, but the trial court refused, opting instead not to impose a sentence for this conviction. It is a violation of double jeopardy to convict someone of multiple murder counts arising from the death of a single murder victim. *People v Clark*, 243 Mich App 424, 429; 622 NW2d 344 (2000). Although we otherwise vacate all of defendant's convictions on ineffective assistance grounds, we note that the trial court should have earlier vacated defendant's second-degree murder conviction under the circumstances, rather than simply choosing not to impose a sentence for that conviction.

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I. BACKGROUND OF THE CASE

A. BASIC FACTS

Defendant's son was two years old when he died. At trial, testimony revealed that defendant began caring for his son in late September 2013, after the child's mother lost custody of him due to drug addiction. In early September 2013, while the child was living with a relative of his mother, the child underwent a CT scan because he had macrocephaly, or an abnormally large head. The CT scan was performed on September 11, 2013; a follow-up MRI was ordered, but the MRI was never performed.

On December 31, 2013, defendant and his girlfriend, Veronica Witherspoon, along with defendant's son and Witherspoon's five children, went to spend the night at a home that Witherspoon had recently rented. Testimony at trial revealed that the older children were playing upstairs while defendant, Witherspoon, and Witherspoon's newborn baby were downstairs. There was also testimony that one of the older children yelled that defendant's son had wet himself. About 10 minutes later, defendant asked Witherspoon where his son's clothes were, and she responded. Defendant then called for his son to come downstairs to be changed.

Witherspoon testified that she was cleaning up in the kitchen and was facing the sink when she heard one or two thumps. Witherspoon said that when she turned around, she saw defendant holding his son up under the child's armpits and asking, "[W]hat's wrong with him?" According to Witherspoon, defendant looked pale and scared and the child's head was clenched back, his eyes looked "dizzy," and he was spitting up. Witherspoon said she told defendant the child was having a seizure and instructed him to lay the child down, which he did. Defendant began to perform CPR and told Witherspoon to call "911."

Emergency medical responders were driving nearby when the call came in and responded to the house within minutes. When they arrived, the child was not breathing and had no pulse. Although paramedics were able to restart the child's heart, he never regained consciousness. Officers who responded to the scene asked defendant what happened and he told them that his son fell down the stairs. The child was taken to the hospital, where a CT scan performed in the emergency room revealed bleeding in the subdural or subarachnoid spaces surrounding his brain. Dr. Robert Beck, the pediatrician who took over the child's care at 8:00 a.m. on January 1, 2014, testified that the child also had "very obvious retinal hemorrhages." Beck related that a CT scan from earlier in the morning showed evidence of "older fluid collections" around the child's brain, which he agreed was consistent with an older head trauma. On January 2, 2014, doctors determined that the child was brain dead and he was removed from life support.

Detective Kristin Cole testified that she interviewed defendant following the incident. She stated that defendant first told her his son fell down a couple stairs. However, she informed defendant that the medical reports showed that the child could not have suffered the head injuries he did from falling down a few stairs. Cole stated that defendant eventually admitted that he caused his son's fall. Defendant told her that his son made it down the steps. Defendant explained that he sat on the second or third step with his son facing him. He then grabbed the child's ankles and pulled them out, "intending for him to land on his butt so that [he] could

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change him out." Instead of landing on his butt, however, defendant explained that the child "went straight back and hit his head on the carpet."

B. TRIAL

The prosecution charged defendant with first-degree felony murder, second-degree murder, and first-degree child abuse arising from his son's death. At trial, the prosecution's theory was that defendant handled the child in a violent and angry manner because the child had wet himself. The prosecution also contended that the child's head injuries could only have been intentionally inflicted or inflicted with wanton and willful disregard of the life-endangering consequences of the act based on its experts' conclusions regarding the amount of force necessary to cause the injuries and the short time in which the child became symptomatic. To this end, the prosecution presented the expert testimony of Dr. Beck, Dr. Brandy Shattuck, a forensic pathologist, and Dr. Rudolph Castellani, a neuropathologist.

Dr. Beck opined that head injuries like those sustained by defendant's son would only be seen "in children who are riding bicycles hit by cars, who are in car seats and T-boned at high speeds, in car seats appropriately restrained but involved in high-speed rollovers, [and] acknowledged shaken episodes." He further testified that "retinal hemorrhages are child abuse unless you can prove through a witnessed account some mechanism of injury that could have caused it." When asked by the prosecutor whether the child's injuries could be consistent with his legs being "taken up" and the child being "thrown down," Beck stated that it "could be a scenario," but explained that it would be "the type of maneuver that I do when I do my ten pound sledge hammer cracking rock . . . for my driveway." On cross-examination, defendant's attorney, Eusebio Solis, asked Beck whether the child's injuries could have been caused if he was in a standing position and his ankles were "grabbed to put him on his butt but he goes all the way back" in a "whiplash motion and he strikes his head." Beck agreed that such a scenario could be a mechanism of injury, but stated that it boiled down to "the speed and the force at which the head hits."

Dr. Shattuck concluded that the child's injuries were "non-accidental" and characterized the force required to cause the injuries as "violent or angry or aggressive types of force" that were "the equivalent of a car accident[.]" When asked by the prosecutor whether the child's injuries could have been caused by "grabbing [his] ankles, pulling him down," Shattuck stated that it depended on "how much force you [use to] pull him," noting that the force would "ha[ve] to be significant." Shattuck further testified that the child's September 2013 CT scan did not reveal "evidence of a bleed," so the older blood around the child's brain must have occurred after the September 2013 CT scan and before the incident in question.

On cross-examination, Shattuck conceded that she did not know exactly how much force would be necessary to cause the child's injuries, but emphasized again that the force would have to be "significant." Solis asked whether the child's injuries could have occurred by defendant pulling on his legs and the child falling back, to which Shattuck stated, "As long as it was a significant force, it wouldn't be a minor pull." When Solis asked why Shattuck characterized the force necessary to inflict the injuries as violent, angry, and aggressive, Shattuck explained that "when people are not in an accident, like a car accident, to get to that level of force, there's usually some type of emotion behind it." Shattuck stated that she listed the manner of death as a

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homicide because she believed someone else caused the child's injuries, but she agreed that she could not determine the actor's intent.

Dr. Castellani testified that the child's injuries were indicative of "inflicted trauma." He explained that subdural hemorrhages in a young child are indicative of abuse if "there's not a motor vehicle accident or some major trauma to explain it," and additionally stated that retinal and subarachnoid hemorrhages were also highly suspicious of abuse. He concluded that the child's injuries were inflicted because there was "simply no other explanation that's credible[.]" On cross-examination, Castellani agreed that it would be possible to inflict such injuries by pulling a child's legs out from under him and causing the child to strike his head in a whiplash like motion. He stated, however, that this was "highly unlikely" because, although "the whole force issue is a little bit of guesswork," the "level of force required to cause a complete neurological and cardiovascular shutdown" would be "substantial."

At trial, Solis conceded that the evidence showed that defendant caused his son's fall, but argued that defendant inadvertently caused his son to strike his head and that the child's death was a tragic accident. The defense did not produce its own expert witness, although funds were approved for that purpose. Instead, Solis pointed out the inconsistencies in the prosecution's case and argued that it had not proved beyond a reasonable doubt that defendant possessed the requisite intent. He emphasized that not one medical expert testified that the child's injuries were, to a medical certainty, caused by child abuse because doctors do not determine intent. Intent, he reminded the jury, is the difference between a crime and a tragic accident. The jury rejected defendant's theory and found him guilty as described.

C. *GINTHER* HEARING

In May 2015, defendant appealed his convictions as of right in this Court. He argued on appeal that Solis did not provide effective representation because he failed to familiarize himself with the medical controversy surrounding diagnoses of abusive head trauma in children and failed to call a medical expert who could have testified favorably for the defense. In February 2016, defendant asked this Court to remand the case to the trial court for an evidentiary hearing—commonly referred to as a *Ginther* hearing after our Supreme Court's decision in *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973)—to develop a factual record concerning his defense counsel's conduct at the trial, and for the opportunity to move for a new trial on the grounds addressed in his appeal. We granted defendant's motion and remanded the case to the trial court so that defendant could move for a new trial, and ordered the trial court to conduct an evidentiary hearing and rule on the motion. *People v Roberts*, unpublished order of the Court of Appeals, entered May 3, 2016 (Docket No. 327296).

At the *Ginther* hearing, Solis testified that he had never handled a case involving abusive head trauma. He admitted that he had told defendant's appellate counsel that he was not familiar with the medical controversy surrounding abusive head trauma in children, but clarified that he "did not see that controversy as a viable defense." Solis explained that in 30 years of practice, he had "never seen a successful short fall defense." Solis testified that it was "correct" that the key issue in the case was the amount of force propelling the child's fall, but he stated that he was unaware of any expert who would testify that the child's injuries could have been caused by a less forceful incident.

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Regarding his trial preparation and investigation, Solis explained that he researched macrocephaly and consulted with a pediatrician who specialized in child abuse, Dr. Stephen Guertin, to determine whether the child's macrocephaly might have made him more susceptible to injury, to get an "assessment of the evidence," and to obtain "a referral of any expert who would say a short fall would cause that injury." Solis stated that Guertin provided him with "articles that talked about children who were injured through falls." With regard to the child's injuries in this case, Guertin told Solis that one could not "rule out accident," but Guertin opined that the child's other injuries were consistent with abuse, which is why, Solis said, he chose not to call Guertin at trial.

Solis also consulted with the prosecution's pathologist, Dr. Shattuck. Based on his discussions with Shattuck, Solis testified that he believed he could get the prosecution's witnesses to concede that "this is not an exact science" and that "we can't determine and we can't rule out, even though they said it was remote, that it could have been caused the way [defendant] said." Solis said he went over the articles he received from Guertin with Shattuck, and she stated that the articles were not comparable because the incidents described were not witnessed and the children did not die. Solis agreed that, at trial, Shattuck testified that the child's injuries were not accidental, although she conceded that pulling the child's legs out from under him could generate sufficient force to cause the injuries.

When asked how he formulated his defense theory, Solis stated that defendant's admissions established that he caused the child's injuries, but there was no evidence that defendant was angry or that he targeted or abused his son leading up to the incident. Solis testified that the circumstances were "indicative of an accidental injury versus an intentional injury," so he cross-examined the prosecution's experts regarding the amount of force necessary to cause the injuries and whether they could have been caused by a whiplash like motion. As for the evidence that the child had an older bleed, Solis said he felt the evidence would show that the child never exhibited a change in behavior and defendant did not have a history of abusing his son, so he could argue that the old injury was accidental.

At the *Ginther* hearing, Dr. Ljubisa Dragovic, a forensic pathologist and medical examiner, testified that he reviewed the report and documentation for the child's autopsy. Dragovic opined that the autopsy should have included more sampling because the preexisting subdural hemorrhage might have played a role in his subsequent head trauma. He testified that there was nothing about the presence of a subdural hemorrhage that suggests an injury was intentionally inflicted; rather, such an injury could occur with "any fall." In Dragovic's opinion, the medical results were consistent with defendant's version of events, and it was "nonsense" to say that the force necessary to cause the child's injuries was comparable to the force involved in a car accident because there was no scientific basis for such a conclusion. He testified that the child's preexisting head trauma may have presented a greater opportunity for reinjury with less force, and there was no basis to determine what caused the prior hemorrhage, except to say that it was caused by the child's head moving and striking an unyielding surface. Dragovic similarly stated that retinal hemorrhages do not, by themselves, indicate child abuse. He further explained that the existence of a prior subdural hemorrhage along with a new one does not indicate abuse. Nor does the immediacy of the child's unresponsiveness indicate abuse. Dragovic concluded that there was no objective evidence in the autopsy report that would allow the conclusion that the child's death was a homicide.

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Dr. Julie Mack, a diagnostic radiologist, testified that she reviewed the child's CT scan performed in September 2013 and the two scans performed on January 1, 2014. Mack explained that there is not necessarily a correlation between the extent of a subdural hemorrhage and the degree of impact or force that caused it. Regarding the child's September 2013 CT scan, Mack testified that it showed prominent fluid outside of the child's brain, and the only way to determine whether the excess fluid was normal would have been to have an MRI, which the radiologist recommended, but it was never done. Mack said that the September 2013 CT scan was insufficient to rule out the possibility that the child had small subdural fluid collections outside of his brain, explaining that if there was extra fluid, the bridging veins would be more susceptible to injury with less force. Mack said that the CT scan taken at 12:56 a.m. on January 1, 2014, revealed evidence of a blood clot in the child's sinus that could have been old, in which case it could indicate that the child's brain was compromised before the injury at issue. Mack said that if this was the case, a lesser injury—one that a normal child would have survived "without even turning a hair"—might topple the brain.

Mack testified that the CT scan taken at 5:07 a.m. on January 1, 2014, showed that the child's brain had become so swollen that it almost completely collapsed the ventricles. She explained that if a sinus blood clot had interfered with drainage, every time the heartbeat filled the blood vessels in the child's brain it could cause swelling. Mack stated that, had she been called to testify at trial, she would have said that the child's injuries could have been caused without significant trauma. She conceded that there was a bleed caused by an impact; she merely disagreed that the indications of the old bleed with the new bleed were suggestive of abuse. She further emphasized that there is no way to determine whether an injury was intentionally inflicted from a CT scan.

Following the hearing, the trial court entered an opinion and order rejecting defendant's ineffective assistance claim and denying his motion for a new trial. The case then returned to this Court. On appeal, defendant argues that Solis should have conducted a more thorough investigation of the medical controversy surrounding abusive head trauma in children and should have obtained an expert witness to testify in support of the defense theory.

II. STANDARD OF REVIEW

Whether a defendant's trial counsel was ineffective involves a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). When the trial court has conducted a *Ginther* hearing to determine whether a defendant was denied the effective assistance of counsel, we will review the trial court's factual findings for clear error. *Id.* Appellate courts review de novo the legal question of whether an attorney's acts or omissions fell below an objective standard of reasonableness under prevailing professional norms and prejudiced a defendant's trial. *Id.* This Court reviews for an abuse of discretion a trial court's decision whether to grant a motion for a new trial. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). A trial court abuses its discretion when it chooses an outcome falling outside the range of principled outcomes. *Id.*

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III. ANALYSIS

To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and that, absent counsel's unprofessional errors, there is a reasonable probability that the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 688, 694; 104 St Ct 2052; 80 L Ed 2d 674 (1984). Under the first prong, a defendant must identify those acts or omissions that he contends were not the result of reasonable professional judgment. *Id.* at 690. The reviewing court must then determine whether the identified acts or omissions were outside the wide range of professionally competent assistance under the totality of the circumstances. *Id.* Regarding the second prong, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. This determination must also be made considering the totality of circumstances. *Id.* at 695.

A defense lawyer must be afforded broad discretion in the handling of cases, which includes the discretion to take a calculated risk and select one defense over another as a matter of trial strategy. *People v Pickens*, 446 Mich 298, 325; 521 NW2d 797 (1994). "Yet a court cannot insulate the review of counsel's performance by calling it trial strategy. Initially, a court must determine whether the 'strategic choices [were] made after less than complete investigation,' and any choice is 'reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.' " *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012), quoting *Strickland*, 466 US at 690-691 (brackets in *Trakhtenberg*).

On appeal, defendant maintains that his case is comparable to *People v Ackley*, 497 Mich 381; 870 NW2d 858 (2015). In *Ackley*, a three-year-old child died while in the defendant's care. According to the defendant, the child had been sleeping alone in her room before he found her unresponsive on the floor by her bed. *Id.* at 384. The prosecution's theory of the case was that the defendant killed the child by blunt force or shaking, while the defendant maintained that she died as the result of an accidental fall. *Id.* At a *Ginther* hearing following the defendant's convictions of first-degree felony murder and first-degree child abuse, defense counsel testified that he contacted a forensic pathologist who informed him that "there was a marked difference of opinion within the medical community about diagnosing injuries that result from falling short distances, on the one hand, and shaken baby syndrome (SBS) or, as it is sometimes termed, abusive head trauma (AHT), on the other hand." *Id.* at 385. The pathologist told defense counsel that he was on the wrong side of the debate to assist the defense, and referred defense counsel to another physician. *Id.* Defense counsel never contacted the physician and did not otherwise research the medical diagnoses at issue. *Id.* at 386. The parties also stipulated to the admission of an affidavit from a forensic pathologist who opined that the child's head injuries were likely caused by an accidental, mild impact. *Id.* at 387.

On appeal, the Michigan Supreme Court concluded that defense counsel performed deficiently "by failing to investigate and attempt to secure an expert witness who could both testify in support of the defendant's theory that the child's injuries were caused by an accidental fall and prepare counsel to counter the prosecution's expert medical testimony." *Id.* at 389. The Court explained that counsel's decision to consult only a pathologist who opposed the defense theory was unreasonable in light of the prominent controversy in the medical community over diagnoses of abusive head trauma and because there was no evidence that counsel was familiar

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with the controversy. *Id.* at 391-392, 394. The Court concluded that defense counsel's performance prejudiced the defendant because expert testimony "was not only integral to the prosecution's ability to supply a narrative of the defendant's guilt, it was likewise integral to the defendant's ability to counter that narrative and supply his own." *Id.* at 397.

A. COUNSEL'S PERFORMANCE

In this case, in order to establish the charge of felony murder, the prosecution had to prove that defendant committed second-degree murder and that he did so during the commission of first-degree child abuse. See MCL 750.316(1)(b). A person commits first-degree child abuse if he or she "knowingly or intentionally causes serious physical . . . harm to a child." MCL 750.136b(2). There is no reasonable dispute that defendant performed an act that caused his son to fall and that the child suffered serious physical harm as a result. See MCL 750.136b(1)(f). Accordingly, the primary issue at trial was whether defendant intended to cause the child serious physical harm when he pulled on the child's ankles, or whether he knew that serious physical harm would be the result. See *People v Maynor*, 470 Mich 289, 295; 683 NW2d 565 (2004).

Similarly, in order to establish that defendant committed second-degree murder, the prosecution had to show that defendant acted with the intent to kill the child, intended to cause great bodily harm, or acted in "wanton and willful disregard of the likelihood that the natural tendency of [his] behavior [was] to cause death or great bodily harm." *People v Aaron*, 409 Mich 672, 728; 299 NW2d 304 (1980). As the prosecutor conceded at trial, there was no evidence that defendant intended to kill the child. So the primary issue was whether defendant intended to cause great bodily harm or acted with wanton and willful disregard of the likelihood that the child would suffer death or great bodily harm.

Because there was no direct evidence that defendant possessed the mental state required to prove either second-degree murder or first-degree child abuse, the prosecutor had to rely on circumstantial evidence to establish defendant's state of mind at the time he pulled on the child's ankles. See *People v Unger*, 278 Mich App 210, 223; 749 NW2d 272 (2008). A reasonable defense lawyer confronted with this scenario would know that evidence concerning the force required to cause the child's head injuries would be imperative to proving defendant's guilt. Likewise, a reasonable attorney would understand that the prosecution's case must depend heavily on expert testimony to establish that the child's head injuries could not have occurred unless defendant acted with sufficient force to cause the child to strike his head violently, thereby demonstrating intentionality, knowledge, or wanton and willful disregard of the likelihood that the child would suffer great bodily injury.[2] At the *Ginther* hearing, Solis testified that he knew a

[2] Again, to that end, the prosecution presented the expert testimony of Dr. Beck, who opined that the child's head injuries would only have been seen "in children who are riding bicycles hit by cars, who are in car seats and T-boned at high speeds, in car seats appropriately restrained but involved in high-speed rollovers, [and] acknowledged shaken episodes;" the testimony of Dr. Shattuck, who characterized the force required to cause the injuries as "violent or angry or aggressive types of force," equivalent to a "car accident;" and Dr. Castellani, who testified that

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key issue at trial would involve the amount of force propelling the child's fall. Yet Solis did not attempt to secure an expert witness who could testify that the child's head injuries resulted from a lesser force than that involved in a car accident, or which could be described as something less than "violent," or who could otherwise prepare Solis to counter the prosecution's expert medical testimony.

Although Solis performed some investigation before trial by researching macrocephaly and consulting with Geurtin and Shattuck, his investigation did not focus on the most important issue of the case—the force with which defendant would have had to act to inflict the child's injuries. The record indicates that Solis failed to investigate this issue and that he was unfamiliar with the medical controversy concerning the amount of force required to inflict the type of injuries involved in this case.[3] See Findley et al., *Shaken Baby Syndrome, Abusive Head Trauma, and Actual Innocence: Getting It Right*, 12 Hous J Health L & Policy 209, 214 (2012) (explaining that "it is no longer generally accepted . . . that massive force—typically described as the equivalent of a multi-story fall or car accident—is required" to produce subdural hemorrhage, retinal hemorrhage, and brain damage, also referred to as the "triad," in young children); see also *Trakhtenberg*, 493 Mich at 54 n 9 ("[A] defense attorney may be deemed ineffective, in part, for failing to consult an expert when counsel had neither the education nor the experience necessary to evaluate the evidence and make for himself a reasonable, informed determination as to whether an expert should be consulted or called to the stand . . . .") (quotation marks and citations omitted).

"While an attorney's selection of an expert witness may be a paradigmatic example of trial strategy, that is so only when it is made after thorough investigation of the law and facts in a case." *Ackley*, 497 Mich at 391 (citations, quotation marks, emphasis, and brackets omitted). In this case, Solis did not demonstrate sufficient understanding of the pertinent medical controversy concerning the amount of force required to inflict the type of injuries involved to legitimize his decision not to attempt to secure expert testimony in support of the defense theory. In cases, like this one, that involve a "substantial contradiction in a given area of expertise," an attorney's failure to engage expert testimony to rebut the prosecution's experts and to become versed in the "technical subject matter most critical to the case" results in "a defense theory without objective, expert testimonial support," and an attorney who is "insufficiently equipped to challenge the prosecution's experts." *Id.* at 392 (quotation marks and citation omitted). Under the circumstances, we conclude that Solis's representation fell below an objective standard of reasonableness.

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the child's injuries were indicative of "inflicted trauma" because there was "simply no other explanation . . . than an inflicted injury upon the child."

[3] Again, at the *Ginther* heading, Solis admitted that he told defendant's appellate counsel that he was not familiar with the medical controversy surrounding abusive head trauma in children, clarifying that he "did not see that controversy as a viable defense."

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B. PREJUDICE

We further conclude that, absent Solis's deficient performance, there is a reasonable probability that the outcome of defendant's trial would have been different. *Strickland*, 466 US at 694. As discussed above, the prosecution conceded at trial that there was no direct evidence that defendant intended to kill his son when he pulled his ankles and caused him to fall. Accordingly, in order to establish second-degree murder, the prosecution had the daunting task of convincing a jury that defendant grabbed his son's ankles with the intent to cause him to fall and suffer great bodily injury or did so with wanton and willful disregard of the fact that the natural tendency of the act would be to cause death or great bodily harm. *Aaron*, 409 Mich at 728. Likewise, to prove first-degree child abuse, the prosecution had to prove that defendant intended to cause serious physical harm or knew that the result of his actions would be to cause serious physical harm. *Maynor*, 470 Mich at 295.

To that end, the prosecutor repeatedly elicited testimony from her experts suggesting that the child's injuries could not have been caused by anything less than a significant force, akin to a car accident. Although Beck and Shattuck appeared to concede that defendant could have caused his son's injuries by grabbing the child's ankles and causing him to fall and strike his head, their testimony suggested that the child did more than lose his balance. It permitted an inference that the child was thrown backwards by an angry and violent jerking of his feet. Likewise, Castellani's testimony suggested that even that version of events was false. His testimony suggested that defendant must have done something even more forceful and violent—and presumably intentional—to cause his son's injuries.

Although Solis was able to get each of these witnesses to concede to some degree on cross-examination that the child could have suffered the injuries in the manner described by defendant, they all maintained that the injuries could only have occurred if defendant pulled the child down with significant force. The testimony by these experts strongly suggested that the child's injuries on the day at issue were the result of defendant's intentional abuse. Solis testified that he spoke with Guertin after Guertin reviewed the autopsy photographs of the child's brain. According to Solis, Guertin opined that one could not rule out an accident, but he did not provide an opinion about the "cause and origin" of the child's head injuries and did not explain *why* he would not rule out an accident. The lack of clear explanation underlying Guertin's opinion necessitated additional inquiry by Solis. Had Solis been better informed about the abusive head trauma controversy, he might have been able to elicit greater concessions from these experts or might have exposed the weaknesses in their opinions to the jury. Moreover, had he called his own expert or experts to testify that the child could have suffered the catastrophic injuries he did by losing his balance and striking his head, apart from a substantial or violent pull by defendant, the jury might have been persuaded that the prosecution failed to prove that defendant had a culpable state of mind when he grabbed his son's ankles and pulled him down. See, e.g., *Ackley*, 497 Mich at 394-397.

For these reasons, we conclude that defendant received ineffective assistance of counsel because Solis failed to adequately investigate and attempt to secure expert assistance in the preparation and presentation of his defense. Accordingly, we vacate defendant's convictions and remand the case for a new trial. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Douglas B. Shapiro
/s/ Michael F. Gadola

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Appendix B

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF KALAMAZOO
****

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

BRIAN KEITH ROBERTS,

Defendant-Appellant.

Court of Appeals File No. 327296
Circuit Court File No. 2014-0714 FC

HON. Paul J. Bridenstine

OPINION & ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL

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At a session of Court in the City and County of Kalamazoo, State of Michigan, on this 4th day of November, 2016.

PRESENT: HONORABLE Paul J. Bridenstine, Circuit Judge

FILED
NOV 04 2016
9TH JUDICIAL CIRCUIT
COUNTY OF KALAMAZOO
KALAMAZOO, MICHIGAN

I. BACKGROUND

Defendant-Appellant Brian Keith Roberts was convicted of one count each of first-degree felony murder[1], second-degree murder[2], and first-degree child abuse[3] following a jury trial that concluded on April 2, 2015. On April 27, 2015, the Defendant was sentenced to life in prison without the possibility of parole for his felony-murder conviction. The victim in this case, Nehemiah Dodd, was his two-year-old son.

[1] MCL 750.316(1)(b).
[2] MCL 750.317.
[3] MCL 750.136b(2).

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Plaintiff's theory of the case was that Nehemiah suffered from abusive head trauma. Plaintiff supported this position with the testimony of three medical experts who claimed that the boy likely died as a result of non-accidental, violently inflicted injuries. The three experts were essentially in agreement that the force needed to cause the child's injuries was of the highest magnitude, similar to that involved in a high-speed auto collision.

Defendant presented a theory that the injuries resulted from his unintentional and accidental conduct toward his son. Defendant gave statements acknowledging that the injuries were, in fact, caused by himself but that he intended no harm. Defendant did not present any expert witness testimony at trial.

Following his sentence, Defendant moved to remand the matter for a *Ginther*[4] hearing and a new trial. The Court of Appeals granted Defendant's request on May 3, 2016. This court then conducted a *Ginther* hearing on June 29, 2016 which continued on August 8, 2016. At those hearings, the court received the testimony of Defendant's trial counsel, Mr. Eusebio Solis, and two experts called by the defense: Dr. Ljubisa Dragovic, a neuropathologist, and Dr. Julie Mack, a pediatric neuroradiologist.

The court has considered all of the pleadings, arguments, and the evidence introduced at trial and at the post-trial hearings.

II. *GINTHER* HEARING

At the evidentiary hearing, Mr. Solis was the first witness to testify. Mr. Solis has been a practicing attorney for approximately thirty years as both a prosecutor and a defense attorney. With regard to Nehemiah's injuries, Mr. Solis testified that: 1) he had never personally handled a case involving abusive head trauma; 2) he had not seen a successful "short fall" defense theory

[4] *People v Ginther*, 390 Mich 436 (1973).

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and was familiar with two or three instances of such a claim that had gone to trial; 3) in anticipation of trial, he researched macrocephaly, a condition that Nehemiah suffered from, and did some further research as well as reviewed studies concerning short falls; 4) he did not view the controversy surrounding abusive head trauma as a viable defense; 5) he met twice with Dr. Steven Guertin, a pediatrician with whom he had personal experience as a prosecutor and as a defense attorney and whom he had always found to be objective and fair in his four or five previous consultations; 6) Dr. Guertin informed Mr. Solis that an argument could be made that the size of Nehemiah's head could have contributed to his injuries and that the possibility that the injuries occurred by accident, as Defendant described, could not be ruled out; 7) he considered having Dr. Guertin testify as an expert but chose not to call him for strategic reasons due to the likelihood that he would also opine that other injuries on the child's body were consistent with physical abuse and Mr. Solis did not want to run the risk of that information being offered to the jury; 8) he met with one of the government's expert witnesses, Dr. Shattuck, and discussed short falls; 9) during his private meeting with Dr. Shattuck, he believed her to be unbiased, objective and helpful; 10) following his meeting with Dr. Shattuck, he realized that she would testify that a great deal of force would have likely caused the injuries but expected that she would concede that it was possible, albeit remote, that the injuries could have been caused by accident; 11) neither Dr. Shattuck nor Dr. Guertin informed him that there were experts available who would have offered an opinion that an accident caused the injuries; 12) he was not aware of an expert who would reach conclusions contrary to the government's witnesses; and 13) at trial, he cross-examined the government's experts on the issues of force, velocity and whiplash and believed he was able to obtain acknowledgments that Defendant's theory of the injuries was possible.

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Mr. Solis further offered that: 1) he was mindful of the statements made by the lead detective at trial questioning his client's veracity during her interviews with him and the evidence of his client's womanizing and lifestyle; 2) he did not object to these revelations because he found the assertions so remote from the pertinent issues and it helped expose law enforcement's zeal in "reaching for straws" to portray Defendant in a negative light, affording him an argument to show the lengths to which the government would go to mask a weak case; 3) he was aware that improper argument was made by the prosecutor during her initial closing remarks to the jury; and 4) he did not object to this argument for strategic reasons; more precisely, it gave him ammunition to argue the law and remind the jury to not let sympathy influence their decision, and because three decades of criminal trial experience has taught him to be concerned that certain objections may be viewed by the jury negatively.

Dr. Dragovic testified that: 1) the sum total of Nehemiah's injuries does not indisputably demonstrate that he died as a result of an intentional act; 2) there is nothing about the presence of both a remote and acute subdural hemorrhage that necessarily reflects abuse; 3) retinal hemorrhaging can occur from issues beyond impact including oxygen deprivation; 4) the failure of one of the government's expert witnesses, Dr. Shattuck, to take samples of the venous sagittal sinus prevents the ruling out of other possible causes of Nehemiah's injuries; 5) the opinions of the experts who testified at trial about the degree of force necessary to cause Nehemiah's injuries are not based on medical evidence; and 6) readily available scientific journal articles suggest that a short fall of less than three feet might have caused Nehemiah's injuries.

Lastly, Dr. Mack testified that chronic or remote subdural hemorrhages are not necessarily indicators of abuse. In particular, Dr. Mack professed that Nehemiah's previous hemorrhage might have made him susceptible to injury with lesser degrees of trauma. Further,

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Dr. Mack maintained that the small amount of subdural bleeding evidenced by the initial CT suggests a less significant impact on the date of injury. Finally, she mentioned that the extent of hemorrhaging is not a reliable indicator of the degree of force that may have caused the initial hemorrhage; in other words, a subdural hemorrhage may occur following minor impact and subsequent cascading.

III. STANDARD OF REVIEW

Michigan appellate courts have articulated some basic principles applicable to claims of ineffective assistance of counsel. To begin with, effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Riley (After Remand)*, 468 Mich 135, 140 (2003).

To establish ineffectiveness, a two-part test expressed by the United States Supreme Court in *Strickland v Washington*, 466 US 668 (1984) must be satisfied. *People v Frazier*, 478 Mich 231 (2007). First, a defendant must show that his counsel's strategy fell below an objective standard of reasonableness based on "prevailing professional norms." *Strickland*, 466 US at 687-688 and *Frazier*, 478 Mich at 243. The errors must be so serious that counsel was not functioning as counsel and that the proceedings were fundamentally unfair and unreliable. *Strickland,* 466 US at 687-688.

Second, a defendant must establish prejudice which is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland,* 466 US at 687, 694 and *People v Trakhtenberg*, 493 Mich 38, 51 (2012). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 US at 694 and *People v Armstrong*, 490 Mich 281, 290 (2011). The "focus of

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inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Strickland,* 466 US at 696.

Two months following this jury verdict, the Michigan Supreme Court published *People v Ackley*, 497 Mich 381 (2015) and decided that a defendant's trial counsel was ineffective when he failed "to attempt to engage a single expert witness to rebut the prosecution's expert testimony, or to attempt to consult an expert with the scientific training to support the defendant's theory of the case." *Id.* at 383.

In *Ackley*, there were no witnesses to a three year old's death. According to the *Ackley* defendant, the child had been asleep alone in her room while under his care. He claimed he discovered the child lying unresponsive on the floor next to the bed. The *Ackley* defendant insisted that the child must have died as a result of an accidental fall, contrary to the government's assertion that the child died from blunt force trauma or shaking. There was no evidence to support the *Ackley* defendant as abusive or motivated to cause harm to the child.

In preparation for trial, *Ackley*'s trial attorney contacted one expert, Dr. Brian Hunter, who immediately informed the attorney "he was 'not the best person' for the defense" as "he was on the wrong side of this debate to be able to assist the defendant[,]" and ultimately told the attorney "that 'you don't want me as your defense expert.'" *Id.* at 385-386. The expert referred the trial attorney to another expert who would give the accused the best shot at delivering a short-fall defense. *Ackley's* trial attorney never contacted this person. The trial attorney also admitted that he did not review any medical treatises nor articles about the medical diagnoses and did not contact nor call as a defense witness any expert. In holding that trial counsel's performance was deficient, the *Ackley* court found:

> the record betrays no objectively reasonable explanation for counsel's decision to confine his pursuit of expert assistance to Hunter, a self-proclaimed *opponent* of

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> the very defense theory counsel was to employ at trial, despite Hunter's referral to at least one other expert who could provide qualified and suitable assistance to the defendant. *Id.* at 390-391.

IV. ANALYSIS

A. Ineffective Assistance of Counsel – Medical Evidence

Defendant's principal argument is that he was not provided adequate representation because his trial counsel failed to perform a substantial investigation into the validity of the prosecution's medical evidence. In particular, Defendant argues that his trial counsel failed to undertake an independent investigation and educate himself regarding the controversial medical science associated with abusive head trauma in children. Further, Defendant insists that his attorney should have presented available contrary expert medical evidence that would have cast meaningful doubt on the government's theory of the case and provided a substantial causation defense of accident. Defendant maintains that the sum total of these failures amounts to ineffective assistance of counsel creating a miscarriage of justice and entitling him to a new trial.

A controversy apparently exists within the medical community regarding diagnosing abusive head trauma in children. There are experts who are capable of making such an assessment. On the flip side, there are experts who find that a reliable diagnosis of abusive head trauma is not possible because it does not rule out other possible causes, such as a short fall or a chronic medical condition that causes a child to be more susceptible to hemorrhaging due to a minor impact. Defendant here maintains that in order to rebut the government's witnesses, who were comfortable testifying to the existence of abusive head trauma, it was essential that his trial counsel was fully aware of and educated about the controversy and that he should have sought an expert who was willing to rebut the government's testimony. It is because Defendant's trial

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counsel did not employ such an approach that Defendant believes he was not afforded effective assistance of counsel.

1. Objectively Reasonable Strategy

Defendant relies heavily on the *Ackley* decision in support of his argument that his trial counsel did not act objectively reasonable. While *Ackley* resembles the instant circumstances, there are a number of distinct and important differences worth mentioning.

First, there is no factual dispute that Defendant actually triggered Nehemiah's injuries. Defendant confessed to being the only one present when Nehemiah was injured and admitted to conduct which led to the fatal injuries. In *Ackley*, there was no evidence the defendant was in the room and the government offered no explanation for the child's injuries beyond the theories present by the experts. *Id.* at 395. Trial counsel here suffered the added burden of incorporating a defense strategy that explained his client's behavior at the time of the injury, including a sensible excuse that incorporated his conduct within minutes of the incident when two public safety officers arrived and attempted to revive Nehemiah.[5] *Ackley*'s trial counsel was not laden with any such challenge.

Second, Defendant's veracity was a crucial aspect of the instant matter. Defendant's trial counsel was acutely aware that he had to address his client's multiple conflicting versions of what transpired. Defendant provided contrasting explanations of his role in Nehemiah's injuries. First, Defendant informed Veronica Witherspoon, now the mother of one of Defendant's

[5] Fourteen-year veteran Officer Daniel Chenier testified that when he arrived within one minute of dispatch, he found Nehemiah Dodd "wasn't lying in a manner that I would expect someone to pass out in or fall asleep in or collapse in. It was a very, I don't want to say the word perfect, but a very maybe staged manner on his back, arms to his side, lying straight down, feet straight up. ... There was no chaos that I observed which in my experience is what is usually happening. It was not chaotic. It was simply Nemo on the floor and that was it." Jury Trial Transcript II, pp190-192. Eleven-year veteran Officer Joel Van Zytveld testified when he arrived with Officer Chenier, "Mr. Roberts was I would say nonchalant. He was like-. I can't-. I would say that, you know, he wasn't excited. He wasn't waving his arms, here he is, here he is, he's in here, come on, get in here but he was just here he is. He's in here. He was nonchalant, almost wasn't real excited." Jury Trial Transcript II, pp 207-208.

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children, that he grabbed Nehemiah's ankle as the boy was on the stairs in an effort to have the boy slide on his butt and that Nehemiah fell backward hitting his head on the stairs.[6] Second, when originally interviewed by authorities, Defendant's inconsistent version to law enforcement was that he only witnessed Nehemiah fall down the stairs, representing that he had not touched the child.[7] Two days later, Defendant again maintained that Nehemiah had fallen down the stairs. More than four months had passed when Defendant met with law enforcement a third time. Defendant began the interview by reiterating that Nehemiah had fallen down the stairs. Later that same day, Defendant acknowledged that his previous statements to law enforcement were untrue and that he had pulled Nehemiah's feet from underneath him which caused the boy to fall backward and hit his head on the carpet at the base of the stairs.[8] Here, defense counsel had to embrace an equivocal client as part of his overall strategy. Such a factor was nonexistent in *Ackley,* as Mr. Ackley's consistency about the event was not an issue.

Third, trial counsel here actually performed some research on the subject matter. Mr. Solis testified that he read up on the topics of macrocephaly and children injured through short falls on the Internet and in case studies within articles provided to him. He obtained funds to speak to a physician on multiple occasions with whom he was familiar and whose judgment he valued. This communication and information provided him a clearer picture of the issue and how to approach it at trial in conjunction with the other evidence.

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[6] Jury Trial Transcript II, pp 135-136, 163.

[7] According to Detective Kristin Cole, Defendant told her: "First he tells me he saw him falling. Then he tells me he didn't actually see him fall, he only saw him hit the landing at the bottom. Then he tells me that he saw him out of the corner of his eye falling. And then he tells me that he was actually in the kitchen and didn't see him at all, just heard the thump." Jury Trial Transcript IV, pp 151-152.

[8] Detective Cole said Defendant revealed: "So Mr. Roberts says that he himself is sitting on the steps, he said, you know, the second or third step up so facing with his back to the stairs. And that Nehemiah is already all the way down the stairs. He describes Nehemiah as standing in front of him facing the stairs, facing Mr. Roberts, so facing the stairs. ... He says he-so he's basically he's sitting, you know, two or three steps up. Nehemiah's standing in front of him like this. He says I grabbed his feet and I pulled his feet out, intending for him to land on his butt so that I could change him out. And instead of him landing on his butt, he went straight back and hit his head on the carpet." Jury Trial Transcript IV, pp. 164-165.

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Fourth, trial counsel spent some time with one of the government's witnesses, Dr. Shattuck, in advance of trial and obtained what he believed was a valuable concession; that is, it was possible that Nehemiah suffered injuries due to accidental conduct. Mr. Solis testified that he met with Dr. Shattuck and found her to be impartial. He testified that at the conclusion of their meeting, he understood that she would agree that his theory was at least a possibility. In fact, at trial, Dr. Shattuck more than once acknowledged that Defendant's premise was conceivable depending on how hard the child was pulled by the ankles.[9] Further, another of the government's experts, Dr. Robert Beck, also confessed at trial that depending on the speed of the fall and the force, Defendant's claimed mechanism of injury was possible.[10] *Ackley's* trial counsel enjoyed no such indulgence from any of the government's five expert witnesses.

Fifth, defense counsel had the additional problem of apparent other injuries on Nehemiah that may have been caused by physical abuse. In his discussions with Dr. Guertin, Mr. Solis weighed the advantage of presenting the expert pediatrician, who apparently would have given testimony that the fatal injuries Nehemiah suffered could have been accidental, against further testimony that may have revealed that Nehemiah had otherwise suffered physical abuse in other areas of his body. In balancing the impact of each, trial counsel concluded that it would be sagacious to avoid the topic of possible other physical abuse altogether in favor of obtaining at least the minimal concession from one or more of the government's witnesses that an accident might have caused the injuries. None of this factored in *Ackley*.

Sixth, distinct from *Ackley*, Mr. Solis was never provided the actual name of an expert who could have meaningfully assisted him. The *Ackley* panel focused in on this fact repeatedly and based its decision in determining that the trial attorney did not meet an objectively

[9] Jury Trial Transcript IV, pp 79-80, 89-90, 93, 96.
[10] Jury Trial Transcript IV, p 41-43, 44-45.

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reasonable standard in large part due to the attorney having received a "specific recommendation to contact a different and more suitable expert." *Id.* at 392.

Certainly the court agrees that trial counsel enjoyed the ability to conduct more research and potentially discover and employ an expert that might have strengthened his contention that the injuries resulted from an accident as well as expose potential weaknesses in the government's case. However, the test is not whether he could have educated himself further, done more investigation, and call an expert witness(es). The inquiry is whether what he actually did in terms of an overall strategy was objectively reasonable.

The court is mindful that defense counsel has extensive discretion in trial strategy. *People v Horn*, 279 Mich App 31, 39 (2008) and *People v Heft*, 299 Mich App 69, 83 (2012). Defense counsel's endeavor is to plant a seed of reasonable doubt in the minds of the jurors. The fact that a particular strategy does not work does not represent ineffective assistance. *People v Matuszak*, 263 Mich App 42, 61 (2004).

Defense counsel encountered a number of concerns that needed to be addressed in developing an overall trial strategy. Defendant maintains that his case is parallel to *Ackley*; specifically, when "there is no victim who can provide an account, no eyewitness, no corroborative physical evidence and no apparent motive to kill, the expert is the case." *Id.* at 397. However, most of the instant issues never permeated *Ackley*. This was not a case that relied solely on experts. There were a myriad of other matters that defense counsel had to contend with.

Unlike in *Ackley* where the high court concluded that counsel "fail[ed] to prepare or show up for battle sufficiently," *Id.* at 397, Mr. Solis developed, came equipped with, and implemented a strategy that was not unreasonable. Trial counsel attempted to present a client, the only

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eyewitness to the event and who admitted that his actions produced lethal injuries, in a light favorable to the trier of fact, despite the client's numerous contradictory statements about how his two-year-old son died. Trial counsel was never informed of a likeminded expert nor did he refuse to speak to one. Mr. Solis educated himself on the medical evidence that would support a theory of accident with a child suffering from macrocephaly and planned on calling his own expert to support the notion. Based on a calculated assessment that calling that witness would jeopardize the positive impression he was attempting to portray of his client, he made a prudent decision not to open up a potentially damaging issue. Instead and importantly, Mr. Solis sought and obtained concessions from, not one, but two of the government's experts that one of his client's three versions of causation was, indeed, possible. This court shall not substitute its judgment for that of counsel regarding matters of trial strategy, even if it turned out to be unsuccessful, nor make an assessment of counsel's competence with the benefit of hindsight. *Matuszak*, 263 Mich App at 48.

Reduced to its core, Defendant reasons that not calling an expert to counter a government expert in an abusive head trauma case is *per se* ineffective assistance of counsel. This court does not agree that this is the standard announced in *Strickland, supra* nor in *Ackley, supra.* "Failing to retain an expert does not always cause counsel's performance to fall below an objective standard of reasonableness." *People v Gardner*, unpublished Mich Ct. of App #323883 (Dec. 29, 2015). Was the overall strategy here objectively reasonable? The court holds that in this instance, it was. On this prong, the court does not find that Defendant has met his burden of establishing that his trial counsel's performance fell below the threshold.

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2. Prejudice

Despite not finding the first prong of the ineffective assistance of counsel test met, the court will analyze the instant circumstances in light of the second prong; that is, whether prejudice resulted. To meet this condition, a defendant must demonstrate that trial counsel's failure to educate himself, investigate and/or call an expert witness deprived him of a substantial defense.

Failure to call a particular witness or present certain evidence constitutes ineffective assistance of counsel only when the failure deprived the defendant of a substantial defense. *People v Payne*, 285 Mich App 181, 190 (2009). A substantial defense is one that may have made a difference in the outcome of the trial. *People v Hyland*, 212 Mich App 701, 710 (1995), *vacated in part on other grounds*, 453 Mich 902 (1996).

The court does not dispute that the jury's decision to convict relied on the government's cause-of-death theory. However, this was not the only evidence that pointed to the Defendant acting intentionally. There were other factors that fortified their determination. For example, Defendant admitted his involvement in the injuries and he could not maintain consistency in his recollection of the event. Also, the Defendant's girlfriend recalled hearing two noticeable thumps from the adjacent room. In addition, the jury received evidence from two experienced law enforcement officers who found the Defendant's calm behavior within moments of the incident noteworthy. The jury heard from a witness, Tobie Jones, who relayed that the Defendant had been verbally and physically abusive and threatening to the child on previous occasions, up until three weeks prior to Nehemiah's death. Jones testified to the following:

> A. After like a couple of weeks, he just started being very violent and verbally abusive towards the child (Nehemiah).
> Q. In what way?

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A. Like he would cuss at him. He'll yell and he'd get mad at me like we would get into it and it's like he would take it out on his son.
Q. In what way?
****
A. He would just be like shut the fuck up, sit the fuck down, turn your head around, go to sleep. ...
***
Q. And what does he [Roberts] do?
A. He'd go over there like, if he see him, be like he constantly moving his head, he would tell him turn around. For whatever reason he never turned his head back around. So his dad would go over there and force turn his head around like lay down and then slam his head down on the ground, on the floor.
***
Q. Was there ever a time when he disclosed to you his ability or inability to take care of Nehemiah?
A. He said that he didn't feel like he could take care of him because he said that he feel like he would hurt him.
(Jury Trial Transcript V, pp 73-78).

While these factors may not have risen to the level of beyond a reasonable doubt absent the medical evidence, they certainly contribute to the theory proffered by the plaintiff.

More significantly on this point, Dr. Dragovic's and Dr. Mack's testimony do not reveal that Defendant was deprived of a substantial defense. Defendant argued at trial that Nehemiah's injuries resulted from an accident and he obtained admissions from two of the government's experts that this was possible. The defense was able to promote a legitimate theory and the jury had the opportunity to consider it. Unlike in *Ackley*, the Defendant's theory here did not exist in a vacuum of his own self-interest. *Id.* at 397. Despite this, Defendant now submits that without the benefit of testimony from someone such as Dr. Dragovic or Dr. Mack the defense of accident did not meaningfully exist and that the trier of fact had insufficient evidence to truly consider it. The court does not agree.

The sum and substance of Defendant's expert evidence at the *Ginther* hearing attacks the credibility of the government's expert witnesses. The two physicians claim that the government's experts: 1) failed to thoroughly conduct an examination of Nehemiah, in particular

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his sagittal sinus; 2) improperly suggested that the injuries must have come from abusive conduct; and 3) exceeded the scope of medical science by voicing an opinion on the level of force necessary to cause the injuries.

On the issue of whether an accident may have been the cause, neither defense expert spoke to any degree beyond it being a possibility. While the introduction at trial of testimony similar to Dr. Mack's and Dr. Dragovic's may have lessened the value the jury awarded to the government's experts, what would have remained from a likely battle of experts when the dust cleared was the same defense obtained; that is, it was no more than a possibility that the injuries were due to unintentional behavior. At best, if believed, the sum total of the evidence would have created an environment where the jury would have been given more of what it already heard.

It is important to be reminded that this prong of the analysis does not ask the court to determine prejudice resulting from the weight of a defense impacted by trial counsel's errors or omissions but prejudice which wholly deprives a defendant of a substantial defense. Defendant was not deprived of a substantial defense simply because his theory and argument were not as convincing as it might have been had he called his own experts. On this question, the Court does not find that Defendant has established that his trial counsel's failures resulted in prejudice.

Ultimately, the court finds that there is insufficient evidence that Defendant was denied effective counsel with regard to trial counsel's handling of medical evidence. In addition, Defendant has not convinced this court that it is reasonably likely the trial result would have been different if his counsel had acted otherwise.

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B. Prosecutorial Misconduct

Defendant also claims that the government committed misconduct in two particular instances: 1) the prosecuting official elicited testimony from the investigating detective that included her vouching for the medical evidence and expressing an opinion on the Defendant's guilt, including representing that the Defendant had showed no remorse; and 2) the prosecutor inappropriately solicited character evidence to invoke sympathy and argued to the jury that the Defendant was a philanderer and a deadbeat dad who did not take care of his kids.

"Prosecutors are typically afforded great latitude regarding their arguments and conduct at trial." *People v Unger*, 278 Mich App 210, 235 (2008). To preserve a claim of prosecutorial misconduct, a defendant must contemporaneously object and request a curative instruction. *People v Bennett*, 290 Mich App 465, 475 (2010). A contemporaneous objection is required for appellate preservation because it permits the trial court, if it sustains the objection, to give a curative instruction. *People v Abraham*, 256 Mich App 265, 274 (2003). "Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements, and jurors are presumed to follow their instructions." *Unger*, *Id.* at 235 (citations omitted).

In the instant matter, Defendant's trial counsel did not object to either the elicited testimony or the argument to the jury and therefore failed to preserve any claims of prosecutorial misconduct. As a result, the court turns to whether unpreserved claims of prosecutorial misconduct occurred. *People v Bennett*, 290 Mich App 465, 475 (2010).

Unpreserved claims of prosecutorial misconduct are reviewed for plain error. *People v Carines*, 460 Mich 750, 763 (1999). The *Carines* Court spelled out the plain error prerequisites and stated that the defendant bears the burden to establish that: "1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id* at

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763. Further, in order for the error to have affected party's substantial rights, it must have caused prejudice, meaning "the error affected the outcome of the lower court proceedings." *Id.* Ultimately, reversal is warranted only when plain error "resulted in the conviction of an actually innocent defendant" or "seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence." *Id.* at 763-764 (internal quotations omitted).

Government remarks must be read as a whole and assessed in light of defense arguments and the relationship they bear to the evidence at trial. *People v Brown*, 279 Mich App 116, 135 (2008). The court is also mindful that error demanding reversal does not exist "where a curative instruction could have alleviated any prejudicial effect." *People v Callon*, 256 Mich App 312, 329-330 (2003).

Indeed, the jury was instructed that the attorneys' arguments were not evidence. M Crim JI 3.5(5). Moreover, the jury was instructed that they must not let sympathy or prejudice affect their decision. M Crim JI 3.1(2). And, jurors are presumed to follow their instructions. *Unger*, *Id.* at 235. These curative instructions alleviated any potential prejudicial effect.

The court is not satisfied that Defendant has established that the introduction of the testimony and the commentary was obviously erroneous.

C. Ineffective Assistance of Counsel - Prosecutorial Misconduct

The court now turns to trial counsel's failure to object to the above instances. Defendant asserts that his attorney's decision not to object to both the testimony and argument supports ineffective assistance of counsel. The court does not agree.

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As mentioned earlier, to demonstrate ineffective assistance of counsel, a defendant must show that his attorney's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 309 (1994). Decisions regarding the defense arguments presented at trial are matters of trial strategy. *People v Strickland*, 293 Mich App 393, 398 (2011).

Counsel's representation is ineffective on the basis of strategy only if the strategy employed was unreasonable. *People v Cline*, 276 Mich App 634, 637 (2007). A resulting failure of trial strategy does not translate into ineffectiveness. *People v Kevorkian*, 248 Mich App 373, 414-415 (2001).

Mr. Solis testified at the evidentiary hearing regarding his failure to object to these instances. In not objecting, Mr. Solis created a suitable avenue to paint a picture of his client as a responsible parent to all of his children, including Nehemiah. Further, the admission of this evidence and argument provided an opportunity to broadcast the considerable lengths to which the government would go in pursuit of his client, a good dad. Mr. Solis frequently referred to this as "static" and his decision to remain patient during this time was not an inappropriate tool to be used later when he revealed that the government is prone to cast aspersions against a well-intentioned dad when the actual evidence is minimal.

The record supports that trial counsel was not negligent but made a purposeful, strategic decision to permit the testimony and argument to demonstrate that the government needed to resort to extraneous material and create a negative view of Defendant because the evidence did not support the elements of the offenses. As it relates to the closing argument, defense counsel adeptly explained this position. Further, he testified at the evidentiary hearing that he was

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prepared to object if it came up again on rebuttal. Finally, Mr. Solis mentioned that he remains cautious during argument and part of his calculated decision-making is the impression he leaves with the jury. After three decades as a criminal trial attorney, it is apparent that he finds that interrupting opposing counsel, even if legally sound, must be done carefully because of how it is received by the trier of fact.

In this court's opinion, shining a bright light on dubious government efforts concerning extraneous matters can be a fruitful endeavor. The court does not find trial counsel's course of action unreasonable under the circumstances. Moreover, the Defendant proffers little to intimate that the exclusion of this evidence and argument would have resulted in a different outcome.

Therefore, the court finds that trial counsel was not ineffective due to his failure to object to evidence presented by the prosecutor.

D. Ineffective Assistance of Counsel – Detective's Testimony

Defendant also complains that his trial counsel was ineffective when he did not advance objections during certain testimony from the government's lead detective.

Defendant directs particular attention to moments where the investigator told the jury that: 1) she did not believe the Defendant's story and that he exhibited little remorse; and 2) Defendant's account was not supported by the medical evidence. Defense counsel maintains that he purposefully withheld objecting to portions of the detective's testimony because his plan was to establish her bias against his client. He was hoping to "paint her as a pushy, hard-nose detective … who wasn't going to believe a word [Defendant] said."[11] In fact, trial counsel himself utilized this when he brought up on cross-examination the detective's method of interrogation and remarked about it in his closing statement to the jury. It is essential to

[11] Evidentiary Hearing Transcript I, p 58-59.

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remember that Mr. Solis had to rationalize multiple versions of the event given by his client. Mr. Solis admitted he planned to use the detective's behavior and persistence as a basis to show why his client initially lied to the police due to fear, police pressure, and the police attitude toward him; specifically, no matter what he said, Defendant was not going to be believed. When faced with a client who has offered up contradictory statements, the court respects that it may be a meaningful exercise to permit the introduction of certain police tactics in an effort to explain peculiar behavior.

The fact that trial counsel's deliberate decisions to allow the testimony and the arguments did not create reasonable doubt is immaterial. As stated previously, the court will not substitute its judgment for that of counsel regarding matters of trial strategy nor will it assess counsel's competence with the benefit of hindsight. *People v Garza*, 246 Mich App 251 (2001).

Trial counsel's decision not to object to the above instances of alleged misconduct does not rise to the level of ineffectiveness. Further, the court is not convinced that were objections made, there exists a reasonable probability that the verdict would have been different.

Therefore, the court finds that trial counsel was not ineffective due to his failure to object to evidence presented by the prosecutor.

V. MOTION FOR NEW TRIAL

MCR 6.431(B) states that "the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." The court is permitted to exercise its sound discretion in making a decision about a request for a new trial and it will be upheld absent clear abuse. *People v*

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Plummer, 229 Mich App 293, 306 (2013); *People v Lemmon*, 456 Mich 625, 634-635 (1998).

MCL 769.26 further clarifies the trial court's decision-making and states:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as any matter of pleading or procedure, unless in the opinion of the court, after and examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

Defendant bears the burden of demonstrating that it is more probable than not that the error complained of undermined the reliability of the verdict or resulted in a miscarriage of justice. *People v Lukity*, 460 Mich 484, 493-494 (1999).

The court has considered each alleged error claimed. No error rises to such a level as to undermine the reliability of the verdict or result in a miscarriage of justice.

Further, the court has considered the sum total of the professed errors. Even when scrutinizing the possible impact of all of Defendant's claims together, the court is not satisfied that the sum total of the errors undermines the reliability of the jury's conclusion or amounts to a miscarriage of justice.

VI. CONCLUSION

For the reasons stated above, Defendant's Motion for New Trial is **DENIED**.

IT IS SO ORDERED.

Dated: November 4, 2016

Honorable Paul J. Bridenstine
Circuit Court Judge

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PROOF OF MAILING

I, Lili M. Klomparens, certify that on this date I sent a copy of this **OPINION & ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL** to the parties in interest at their above stated addresses via ordinary mail.

Dated: November 4, 2016

Lili M. Klomparens

Ms. Lili M. Klomparens
Judicial Aide to Hon. Paul J. Bridenstine